FILE COPY

No. 667

In the Supreme Court of the United States

OCTOBER TERM, 1936

ANNISTON MANUFACTURING COMPANY, A CORPORATION, PETITIONER

v.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 667

ANNISTON MANUFACTURING COMPANY, A CORPORATION, PETITIONER

v.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 37–39) is reported in 15 F. Supp. 257. The opinion of the Circuit Court of Appeals (R. 47–59) has not yet been officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered January 8, 1937 (R. 60). The petition for a writ of certiorari was filed January 21, 1937, and was granted February

15, 1937. (R. 6.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the District Court could entertain this suit for the recovery of floor stocks taxes and processing taxes paid under the Agricultural Adjustment Act, notwithstanding the provisions of Title VII of the Revenue Act of 1936.

STATUTES INVOLVED

The applicable provisions of the statutes involved will be found in Appendix A, *infra,* pp. 165–187.

STATEMENT

This action was brought in the United States District Court for the Northern District of Alabama for recovery of amounts paid as floor stocks taxes and processing taxes under the provisions of Sections 9 and 16 of the Agricultural Adjustment Act (*infra,* p. 185). The complaint, originally filed November 22, 1935 (R. 1–15), was subsequently amended on June 12, 1936 (R. 18–26), and on July 3, 1936 (R. 29–32).

The complaint alleged that the taxpayer, an Alabama corporation, paid to the respondent, as Collector of Internal Revenue, processing and floor stocks taxes imposed under the Agricultural Adjustment Act in the respective amounts of $257,935.77 and $11,918.28 (R. 1–2, 8–9), for which claims for refund were filed on June 12, 1935, and

rejected by the Commissioner of Internal Revenue on August 16, 1935 (R. 4, 11). Recovery is sought on the sole ground that the Agricultural Adjustment Act under which these amounts were collected was unconstitutional.

The Collector moved to dismiss the complaint on the ground that the court was without jurisdiction to entertain the suit, and on the further ground that the complaint failed to state a cause of action against the Collector under Section 21 (d) of the Agricultural Adjustment Act, as amended (R. 15–18, 27–28). The motion to dismiss, as amended, was overruled by the District Court on the ground that the same question could be reached by a demurrer (R. 33–34, 38–39). The Collector then demurred to the complaint on the grounds originally asserted in the amended motion to dismiss (R. 32–33). Following the enactment of Title VII of the Revenue Act of 1936 (Appendix A, *infra*), the Collector's demurrer was amended (R. 34–37). The amended demurrer alleged that the court was without jurisdiction of the action because of certain provisions of Title VII of the 1936 Act, and on the further ground that the complaint, because of the provisions of that title, failed to state a cause of action against the Collector. The District Court sustained the demurrer on the latter ground and entered judgment for the Collector (R. 38–40). On appeal the Circuit Court of Appeals affirmed the judgment of the District Court, holding that there was no juris-

diction in the District Court to entertain this suit (R. 78, 79). The petitioner thereupon filed a petition for a writ of certiorari which was granted by this court.

SUMMARY OF ARGUMENT

I

Sections 906 (a), 904, and 910 unequivocally prohibit the maintenance of this suit. It is unnecessary to consider the adequacy of the substitute remedies which have been provided, for long established and unquestioned principles of constitutional law demonstrate that Congress has a complete and unfettered power to give, withhold, or take away the jurisdiction of the inferior Federal courts. *Sheldon* v. *Sill,* 8 How. 441, 448; *Aetna Life Insurance Co.* v. *Haworth,* No. 446, October Term, 1936. This power is in no sense limited by the fact that it may be exercised to remove jurisdiction over suits which were pending, or capable of being brought, at the date of enactment. *Smallwood* v. *Gallardo,* 275 U. S. 56, 62; *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 234.

Since petitioner does not question these settled principles, it seems that the disposition of this case must be made on this ground alone. The only theory by which a further inquiry is relevant is that which assumes that, if other provisions of Title VII are not valid, the jurisdictional provisions are inseparable and must also fall. This theory, however, ignores the fact that Congress would ap-

parently have preferred to leave Agricultural Adjustment Act taxpayers without any remedy rather than to provide for refund upon mere proof of payment. Moreover, it is wholly inadequate to explain how jurisdiction may be exercised merely because a prohibition of the jurisdiction is held to be inoperative. The Federal courts must have an unrepealed statute authorizing the exercise of judicial power; even if the jurisdictional provisions should fall, there would be in existence no statute authorizing the maintenance of these suits.

II

It is plain, and no contention is made to the contrary, that Title VII prevents petitioner from stating a cause of action against the Collector. It can, therefore, secure reversal only if Section 902 (and Section 903) and Section 910 are each held unconstitutional. While it is unnecessary in this case to decide whether the Collector shares the sovereign immunity to suit, it should be noted that the decision below cannot be reversed without a holding that this immunity does not extend to the Collector.

III

1. Petitioner has not, and cannot, state a common law action against the Collector on the theory of money had and received. The settled rule that the agent of a known principal cannot be held per-

sonally liable if, pursuant to his duty, he has paid the money over to his principal, is fully applicable to the revenue collector. *Cary* v. *Curtis*, 3 How. 236; *Curtis's Administratrix* v. *Fiedler*, 2 Black 461, 478. Consequently, it is established that the revenue collector is sued, not in the common law action of assumpsit, but under a purely statutory remedy. *The Collector* v. *Hubbard*, 12 Wall. 1, 12, 14; *Arnson* v. *Murphy*, 109 U. S. 238, 240, 243; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382–383.

The cases, such as *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, in which this action has been said to be personal are in no manner inconsistent with this settled rule. If Congress chooses to extend a remedy in the form of a personal action, it must be taken to have intended that the ordinary procedural incidents of such an action would apply.

2. No added virtue is lent to petitioner's complaint because the Collector was acting under a statute later held unconstitutional. Petitioner's argument is based solely upon the fiction that an unconstitutional statute was never enacted, and that the Collector, therefore, was acting in the complete absence of authority. It ignores the reason for the rule of personal liability, the purpose of which is to protect the citizen from arbitrary action from an especially dangerous source. *Ashby* v. *White*, 22 Ld. Raym. 938, 956. Action under a statute later declared to be unconstitutional presents no danger of this character.

The decisions of this Court make it clear that it has rejected any such unflinching application of the theory that an invalid statute is void *ab initio*. It has indicated that the Collector would be a trespasser only after final decision of invalidity. *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110, 113. It does not allow the public official a standing to attack the constitutionality of a statute which he is under a duty to enforce. It does not view mere allegations of unconstitutionality, admitted on demurrer, to convert the tax collector into a trespasser, who may be restrained by equity. There is no reason why the established immunity of the Collector who, in good faith, collects under a merely illegal assessment should not be extended to the Collector who acts under an assessment based upon an unconstitutional statute.

If there were any doubt on the question, the threat to orderly administration of the Government which would be represented in a decision of personal liability must compel another decision. Of ministerial officers "the law exacts unhesitating obedience to its process." *Harding* v. *Woodcock*, 137 U. S. 43, 48. Subordinate officials must devote their efforts to the enforcement of the laws and not to the subtle dialectics of constitutional law.

IV

Petitioner argues with some vehemence that it has a vested right in the recovery of the taxes to which it was entitled at the time this cause of

action arose. We are not certain of the precise import of this contention.

1. If petitioner means that he has a vested right in the recovery guaranteed by the Constitution, we have no quarrel with its argument. But the Constitution does not protect petitioner's claim for full recovery of the taxes. Its protection extends no farther than to insure that it may recover the taxes whose economic burden it has borne. *United States* v. *Jefferson Electric Co.*, 291 U. S. 386. This right remains to the petitioner under Title VII, the sole effect of which in this respect is to withdraw one of the alternative remedies, suit against the United States or suit against the Collector, and leaves the other unimpaired.

2. If, however, petitioner's position should be that it has a vested right in the continuation of the remedies existing when its cause of action accrued, even though it would recover under them more than the Constitution would otherwise protect, we submit that its argument flies in the face of established law.

None can assert a vested right in any mode of procedure or in any particular remedy. *Richmond Mortgage Corp.* v. *Wachovia Bank*, No. 235, October Term, 1936. The fact that a nominal party defendant can no longer be sued operates in no manner to limit the power of Congress to substitute a new remedy for the recovery of taxes. *Burrill* v. *Locomobile Co.*, 258 U. S. 34. Even were petitioner's asserted cause of action one which is based

on the common law, there is no magic which places a common law action beyond the power of the legislature to control or abolish. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Crowell* v. *Benson*, 285 U. S. 22.

It follows *a fortiori* that the Congress has power to substitute a new remedy with respect to controversies between the Government and its taxpayers. *The Collector* v. *Hubbard*, 12 Wall. 1, 14; *Ex parte Bakelite Corp.*, 279 U. S. 438, 451. Especially is this the case since the suit for a refund of taxes is in substance and reality merely a remedy against the United States, even though the Collector be the nominal party defendant. *Philadelphia* v. *The Collector*, 5 Wall. 720, 735; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382–383.

V

1. The Agricultural Adjustment Act was in force for more than two and a half years. Under its authority relatively heavy taxes were collected on the basic commodities of the nation's economy. It was inevitable that economic readjustments should be made in the light of these taxes. Economists are agreed that such taxes, applicable indifferently to every competitor, ordinarily tend to be shifted to another than the nominal taxpayer.

Congress recognized this principle in the enactment of the Agricultural Adjustment Act, and plainly expected that the burden of the tax would be shifted to the consumer. Its subsequent history demonstrates that the cotton industry, as well as

other processing industries, in general, shifted the burden of this tax to the consumer.

Accordingly, Congress was faced by a problem of great difficulty with respect to the $963,000,000 collected in taxes before this Court declared the Act to be unconstitutional. There seem to have been only four alternatives.

Congress could have refunded the taxes upon mere proof of their payment. Since the typical processor was not in fact injured by the imposition of this tax, such a refund would be a gratuity of unprecedented size. Alternatively, Congress could have adopted the rough generalization that the consumer had in every case borne the burden of the tax. However, it is plainly impossible, as a practical matter, to determine either the particular consumer or the amount of the tax burden which he bore.

In the third place, Congress could have refused to make any refund of the taxes. Since the general taxpayers as a class are roughly equivalent to the consumers as a class, this provision would come relatively close to a just solution. The legislative history of Section 21 (d) of the Agricultural Adjustment Act indicates that Congress would have preferred this solution to an automatic refund upon mere proof of payment.

However, it was recognized that an occasional processor was in fact injured through the imposition of this tax. A government solicitous to avoid injustice to such a taxpayer would provide for refund to him and, if it were equally anxious not to

penalize its taxpayers for the benefit of the processors who were not injured by the tax, it would at the same time provide that no refund should be made to those taxpayers who did not bear the burden of the tax. This alternative was the one which Congress adopted in forming the Revenue Act of 1936. We submit that it is the fairest remedy which Congress could have applied to a situation of great difficulty.

2. Preliminary to discussing the particular objections raised to the provisions of Title VII, it is necessary to examine which of the questions raised by the petitioner may be considered in the case at bar. We agree that this Court, if it considers the constitutionality of these provisions to be relevant to the disposition of this case, may properly pass upon those questions which appear on the face of the Act. These embrace: (1) The procedure set up in Section 906 by which an administrative tribunal is provided to review the Commissioner's disallowance of processing tax refund claims; and (2) the constitutionality of Section 902, which provides in substance that the Agricultural Adjustment Act taxpayer can obtain a refund of the taxes to the extent that he shows that he bore the burden of their imposition.

However, we emphatically challenge petitioner's belief that this Court at this time can consider the objections which he raises to Section 907. These questions all relate to the manner in which the actual proof of the tax incidence will be made or

to the possibility of making adequate proof of this fact. In the absence of the facts of an actual case, the inquiry must be purely speculative and abstract. This Court has frequently declined to make constitutional decisions upon such questions when the facts are purely a matter of speculation. *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245; *Boston & Maine R. Co.* v. *Armburg,* 285 U. S. 234. 234.

VI

Petitioner attacks the administrative remedy provided for the recovery of processing taxes as unconstitutional. The Commissioner's disallowance of the claim is to be reviewed, under Section 906, by an administrative tribunal set up in the Treasury Department. Its decisions are subject to review on questions of law by the Circuit Courts of Appeals, and further review may be had in this Court on writ of certiorari. The procedure is analogous to that obtaining in the Board of Tax Appeals, and we do not see that there can be any serious question as to its constitutionality.

Petitioner attacks it only on two grounds. He objects that the members of the Board are taken from the Treasury Department. But in this manner Congress was able to secure administrative experts trained in the field of taxation. The members of the Board will not, of course, have any duties in connection with the Commissioner's examination of refund claims. The whole history of administrative law is founded on a tradition which

combines investigatory and quasi-judicial functions in the same agency.

Petitioner also objects that one officer or member of the Board might hear the evidence and another decide the case without considering the evidence. This contention is contrary to the express provisions of Section 906.

VII

1. Section 902 in substance provides that no refund shall be made of a tax collected under the Agricultural Adjustment Act unless the claimant shows that he bore the burden of this tax. Like Section 21 (d) of the Agricultural Adjustment Act, it was adopted because of the legislative recognition of the principle that a taxpayer is unlawfully enriched if he is allowed a refund of a tax the economic burden of which has been shifted to another.

We do not believe that there can be any constitutional objection to such a limitation in view of the decision in *United States* v. *Jefferson Electric Co.*, 291 U. S. 386. That case upheld Section 424 of the Revenue Act of 1928, which limited the refund of the Automobile Accessories Tax to taxpayers who had not "collected, directly or indirectly", the amount of the tax from their vendees. While the *Jefferson Electric* case involved a sales tax rather than a manufacturing tax, we do not see that this distinction in any way affects the principle that a taxpayer can claim no constitutional right to the refund of taxes unless he has in fact borne the economic burden.

This principle is sanctioned by the equitable basis of the action for money had and received. *Myers* v. *Hurley Motor Co.*, 273 U. S. 18, 25. The same principle has often been applied in tax controversies. The fact that the vendees could not recover from the taxpayer in quasi-contract, and the fact that the processor could gain no immunity because of sales to a state instrumentality are immaterial to the *economic* fact of tax shifting.

The argument that whether or not the taxpayer bore the burden of the Agricultural Adjustment Act tax is no concern of the Government, but relates only to the equities between the taxpayer and his vendees, ignores the fact that retention by the Government is the closest possible approximation of their refund to the consumer. In any event, the equitable defense of unjust enrichment is directed at the weakness of the plaintiff's claim, and the rights of the consumers are objections which the processor "cannot be heard to make." *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, 484. See also *Perry* v. *United States*, 294 U. S. 330.

Since Congress had power to impose this limitation upon the right of recovery of taxes illegally collected, long sanctioned practice permits it to place the burden of proof upon the taxpayer in common with the other elements of his claim.

2. Whether or not Section 907 provides a fair and practicable method of proving whether or not the processor shifted the burden of the tax cannot

adequately be answered in this case. But if this Court feels that it should consider the speculative attacks made by petitioner, we submit that the section must be sustained on every count.

The basic premise of Section 907 is that any unexplained decline in earnings during the period of the tax will indicate that the processor bore the burden of the tax, while constant or increased earnings will indicate that the burden was shifted to others. Accordingly, the statute contemplates a comparison of earnings during the tax period with those during a representative period before and after the tax. In the interests of a preliminary simplification, a decrease in the gross processing margin is made *prima facie* evidence that the claimant bore the burden of the tax, while an unchanged or increased margin indicates that the tax burden had been shifted. However, it is recognized that changes in the gross processing margin might involve factors other than the tax. Accordingly the *prima facie* results may be refuted by the process of rebutting the assumption that no other factor entering into the processing margin had changed during the tax period. In result, either the Commissioner or the taxpayer has power to take into account all factors which enter into the earnings of the processor, and any remaining variation must be due to the only new factor, the processing tax.

Petitioner urges that the section imposes an impossible burden of proof because it requires that

the claimant establish the prices which would have prevailed had the processing tax not been in effect. But it makes no such requirement, and permits a refund on the basis of a comparison of the processing margins with adjustment for changes in factors other than the tax. While an ideal system might seek also to include the effect of the tax itself on market forces, Section 907 was pre-designed for a world of reality, not of abstractions. See *Weiss* v. *Wiener*, 279 U. S. 333, 335; *Helvering* v. *Midland Mutual Life Insurance Co.*, No. 257, October Term, 1936. Petitioner does not argue that it is impossible to prove the processing margins themselves or the changes in other costs of processing which may be used to refine the margin results.

The presumption established by 907 (a) is plainly capable of rebuttal, and is therefore not invalid because conclusive. It can, therefore, be held unconstitutional only if the result presumed has no rational connection with the facts which raise the inference. Petitioner's argument, at most, merely shows that the presumption gives rough rather than precise results; we do not see how this admitted inaccuracy, which may subsequently be removed under Section 907 (e), can be stretched into an absence of rational connection. Indeed, the margin analysis is customarily used in the textile industry itself.

Petitioner urges that Sections 902 and 907 are unconstitutional because of their failure to allow for the consequential losses suffered by processors

because of the imposition of the processing tax. However, production in the textile industry actually increased after imposition of the tax, and we do not see that petitioner is in a position to complain. While the increase in sales would probably have been larger had there been no tax, it seems equally plain that the benefit payments of the Agricultural Adjustment Act contributed to an increase in the sale of cotton textiles, which would not have obtained had it not been for the tax. We see nothing unfair, much less unconstitutional, in failing to provide for consideration of these compensatory and wholly incalculable and remote factors.

The period with which comparison is made in order to determine whether or not the processing tax affected earnings is the two years prior to the imposition of the tax and the six months, February to July 1936. Petitioner's attack upon this period as unfair ignores the last six months and the fact that a better comparison is had if periods relatively close in point of time are examined. This is especially the case in the cotton industry where there has been a pronounced and steady decline in the processing margin during the decade preceding the tax.

Section 907 thus provides a fair and practicable method of determining whether or not the burden of the tax was borne by the processor. If it does not embody perfect economic theory, and if in actual practice it should not produce a perfect precision of analysis, these are defects common to all taxing statutes. The Constitution does not de-

mand an impossible perfection. *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, 190, 191.

ARGUMENT

I

CONGRESS DEPRIVED THE DISTRICT COURT OF JURISDICTION OF THIS SUIT IN EXERCISE OF ITS PLENARY POWER OVER THE JURISDICTION OF INFERIOR FEDERAL COURTS

This is a suit against the Collector of Internal Revenue to recover floor stocks taxes and processing taxes imposed by the Agricultural Adjustment Act. When it was begun in November 1935, the District Court had jurisdiction of such a suit subject to the limitations of Section 21 (d), (e), and (g) of the Agricultural Adjustment Act, as amended by the Act of August 24, 1935 (c. 641, 49 Stat. 750, 770, Sec. 30). But before the case was disposed of by the District Court, Title VII of the Revenue Act of 1936 was enacted (c. 690, 49 Stat. 1648), which repealed Section 21 (d), (e), and (g) of the Agricultural Adjustment Act, as amended, and substituted new remedies for the recovery of floor stocks taxes and processing taxes in lieu of the remedies theretofore existing.

We do not believe that there can be any serious question but that Title VII forbids the maintenance of this suit and deprives the District Court of its jurisdiction.

First. In so far as this suit seeks recovery of processing taxes, as distinguished from floor stocks

taxes, Section 906 (a) *infra,* p. 168) provides that "no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court" for the recovery of such taxes. In place of such a remedy, Section 906 (b) establishes a Board of Review in the Treasury Department to which is given, subject to judicial review, the exclusive jurisdiction to review the action of the Commissioner of Internal Revenue in disallowing in whole or in part any claim for the refund of processing taxes.

Second. In so far as this suit seeks recovery of floor stocks taxes, Section 904 (*infra,* p. 167) provides that "no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court" prior to the disallowance by the Commissioner of a claim filed under the provisions of Title VII.[1] The bill does not allege that such a claim was filed, or that it was denied by the Commissioner.

Third. Section 910 (*infra,* p. 178) provides, in substance, that no collector shall be liable for the recovery of any Agricultural Adjustment Act taxes which he collected in the course of his official duties and paid into the Treasury.[2] The bill

[1] Under Section 904 suit may also be brought if the Commissioner renders no decision within 18 months after the claim was filed.

[2] It is not entirely certain whether Section 910 is more properly classified as a limitation upon the jurisdiction or as a redefinition of what constitutes a good cause of action. We have, accordingly, treated it under both heads. See *infra,* p. [illegible]33

does not allege that the respondent collected any of the taxes other than in the course of his official duties, or that they were not paid into the Treasury.

There can be no question but that this suit falls within the terms of these sections. Petitioner does not argue to the contrary.[3] The court below held that Title VII deprived the District Court of jurisdiction (R. 59), and no court that has yet passed upon the question has expressed any doubt that Sections 904, 906 (a), and 910 operated, if valid, to deprive the courts of jurisdiction. *Continental Mills* v. *United States,* 17 F. Supp. 138 (C. Cls.), certiorari denied, No. 572, October Term, 1936; *Butler* v. *Carney,* 17 F. Supp. 133 (D. Mass.); *Sheridan Flouring Mills* v. *Cassidy* (D. Wyo.), 17 F. Supp. 598; *Cudahy Packing Co.* v. *Harrison* (N. D. Ill.), decided February 9, 1937, not yet officially reported but found in 1937 C. C. H., Vol. 3, p. 9450; *Wilkes-Barre Lace Mfg. Co.* v. *Mundy* (M. D. Pa.), decided January 28, 1937, not yet officially reported but found in 1937 C. C. H., Vol. 3, p. 9405; *Cudahy Bros. Co.* v. *LaBudde* (E. D. Wis.), decided December 28, 1936, not yet reported;

[3] While not denying that these sections, if valid, prevent maintenance of this suit, petitioner does state (Br. 74) "There is certainly no basis for suggesting that Congress has attempted in Title VII to exercise its peculiar control over the jurisdiction of inferior Federal courts." Unless petitioner believes there is some especial magic in the particular word "jurisdiction", we cannot understand how it reaches this rather paradoxical conclusion.

Edwin Cigar Co. v. *Higgins* (S. D. N. Y.) decided December 18, 1936, not yet officially reported but found in 1937 C. C. H., Vol. 3, p. 9224, now pending in the Circuit Court of Appeals for the Second Circuit; *Chas. W. Priddy & Co.* v. *Early* (E. D. Va.), decided October 29, 1936, not yet officially reported but found in 1936 C. C. H., Vol. 4, p. 10,336; *Marshall Field & Co.* v. *United States* (Customs Ct.), decided December 16, 1936, not yet officially reported, but found in 1937 C. C. H., Vol. 3, p. 9240.[4]

Since it is clear that Title VII withdraws the jurisdiction of the District Court to entertain a suit such as this, the only question is whether or not Congress has constitutional power so to curtail the jurisdiction of the District Court.

Before discussing this power we should like to emphasize that Congress has not removed the jurisdiction of the lower courts without making fair and adequate provision for a substitute remedy. This remedy we discuss in detail in a later section (*infra*, pp. 107–164). However, the character and adequacy of this remedy are, we believe, matters which

[4] All of the above cited cases were decided in favor of the Government except the *Priddy & Co.*, *Cudahy Bros. Co.*, and *Marshall Field* cases, in each of which Title VII was held to be unconstitutional.

Barlow-Moore Tobacco Co. v. *United States* (W. D. Ky.), decided December 12, 1936, not reported, certiorari denied, No. 576, October Term, 1936, also decided in favor of the Government, was a suit which was brought after the enactment of the Revenue Act of 1936.

cannot properly be considered in this case. For, as we read them, both the terms of the Constitution and the decisions of this Court compel the conclusion that Congress has a complete and unrestricted power to withdraw the jurisdiction of the inferior Federal courts over any suit, at any stage of the proceedings.

Section 1 of Article III of the Constitution provides that "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." In consequence the lower Federal courts do not derive their jurisdiction directly from Article III of the Constitution but are created by and acquire their jurisdiction from Acts of Congress. *Aetna Life Ins. Co.* v. *Haworth,* No. 446, October Term, 1936; *Stevenson* v. *Fain,* 195 U. S. 165, 167; *Ex parte Wisner,* 203 U. S. 449, 455; *Sheldon* v. *Sill,* 8 How. 441, 448. They are thus courts of limited jurisdiction and can exercise only such powers as Congress, within the limits of the Constitution, confers upon them. *Ex parte Robinson,* 19 Wall. 505, 511; *Kline* v. *Burke Constr. Co.,* 260 U. S. 226, 234; *Gillis* v. *California,* 293 U. S. 62, 66; *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551. It results that Congress, so long as it does not expand the jurisdiction beyond that specified in Article III, may give, withhold, or take away their jurisdiction in its unlimited discretion. *Sheldon* v. *Sill, supra,* 448; *DeGroot* v. *United States,* 5 Wall. 419, 432; *Case of the*

Sewing Machine Companies, 18 Wall. 553, 577; *Cary* v. *Curtis,* 3 How. 236, 244–245; *Kentucky* v. *Powers,* 201 U. S. 1, 24.

A necessary consequence of the principle "that the courts created by statute must look to the statute as the warrant for their authority" (*Cary* v. *Curtis, supra,* 244) is that no case can be decided after repeal of the statute which confers jurisdiction. It is further established by the decisions of this Court that an express or implied repeal of the jurisdictional statute leaves both the trial court and the appellate court powerless to decide cases which at the time of repeal were pending in the trial court. *Insurance Company* v. *Ritchie,* 5 Wall. 541, 544; *The Assessor* v. *Osbornes,* 9 Wall. 567, 575; *Hallowell* v. *Commons,* 239 U. S. 506, 509. Even when the repeal occurred after decision by the trial court, and pending review by this Court, it is settled that the case must be sent back to the trial court with directions to dismiss for want of jurisdiction, for "when the root is cut the branches fall." *Smallwood* v. *Gallardo,* 275 U. S. 56, 62; cf. *Western Union Tel. Co.* v. *L. & N. R. R. Co.,* 258 U. S. 13, 19.

The principles of constitutional law which must govern this case are succinctly summarized in *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 234, where this Court said:

> Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general

> government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. *Turner* v. *Bank of North America,* 4 Dall. 8, 10; *United States* v. *Hudson & Goodwin,* 7 Cranch, 32; *Sheldon* v. *Sill,* 8 How. 441, 448; *Stevenson* v. *Fain,* 195 U. S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. *The Mayor* v. *Cooper,* 6 Wall. 247, 252. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. *The Assessors* v. *Osbornes,* 9 Wall. 567, 575. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right.

Petitioner objects that his constitutional rights are invaded by this withdrawal of jurisdiction. But, as this Court stated in *Kline* v. *Burke Construction Co., supra,* a right to bring suit in the Federal courts depends upon the will of Congress, and "cannot well be described as a constitutional right." Since Congress has the sole power to define the jurisdiction of the inferior Federal courts, "the statute which does prescribe

limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein." *Sheldon* v. *Sill,* 8 How. 440, 448. Phrased another way, the District Court must have Congressional authority to act, whatever may be the consequences of its inability to act. The principle was plainly stated by this Court, in regard to the strictly analogous power of Congress to make exceptions to and regulations of the appellate jurisdiction of the Supreme Court. It held, in *Ex parte McCardle,* 7 Wall. 506, 514, that:

> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.
>
> What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. *Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.* And this is not less clear upon authority than upon principle. [Italics added.]

It seems, therefore, to be settled beyond any question that an inferior Federal court is possessed only of the jurisdiction which Congress has given it. Jurisdiction over this type of case has expressly been withdrawn. It would seem to follow

that the inquiry should stop at this point, for, whatever the merits of petitioner's contentions as to the status of the suit against the Collector or the character of the remedy provided by Title VII, none will serve as a substitute for Congressional authority to hear the case.

The only theory by which the remaining questions can be relevant is that which assumes that the jurisdictional provisions of Title VII are inseparably linked with the provisions which provide substantive principles and a procedural system for the recovery of the Agricultural Adjustment Act taxes. From this petitioner argues (Br. 73–74) that if these latter provisions are invalid the jurisdictional provisions must also fall, and that the earlier authority to take jurisdiction of these suits remains unimpaired. We think this theory unsound.

First. It is not at all clear that Congress would have continued the jurisdiction of the District Courts to entertain suits for the recovery of these taxes even though it had failed to provide in Section 902 that the taxpayer could recover only so far as he shows that he bore the burden of the tax. As we will later indicate (*infra*, pp. 91–95), it was common knowledge that less injustice would have been done had none of the taxes been repaid than if they had been returned in their entirety to the nominal taxpayers. While it is, of course, a matter of pure speculation, we are of the opinion that Congress would have preferred to leave these taxpay-

ers remediless rather than to present them with a gigantic bounty bearing no relation to actual losses suffered because of the Agricultural Adjustment Act taxes. Indeed, the amendments of 1935 passed the House and were favorably reported to the Senate in a form which would deny *all* possibility of recovery of these taxes (see *infra*, pp. 93–94). As to provisions other than Section 902 it is perfectly plain that, even if these had not been enacted, Congress would have deprived the District Courts of jurisdiction pending the filing of claims based upon the requirements of Section 902.[5] Petitioner does not argue to the contrary (see Br. 73–74).

In any event, Section 1002 of the Revenue Act of 1936 contains the usual separability clause. The effect of this provision is to create a presumption that each of the provisions would have been enacted separately. *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 184–185; *Champlin Refining Co.* v. *Commission*, 286 U. S. 210, 234–235. Petitioner shows that Sections 904 and 906 (a) were necessary to

[5] If Section 907 were declared invalid, the principle of Section 902 would apply to processing taxes unaided by the assistance granted the Commissioner and the taxpayer by that Section. If Section 906 were held invalid, and assuming that we are wrong in our argument that courts cannot exercise jurisdiction merely because its withdrawal is inseparably tied to an invalid provision, the parenthetical exception of processing taxes found in Sections 904 and 905 would also fall. This would result in the District Courts and the Court of Claims having jurisdiction of suits for the refund of processing taxes, as well as floor stocks and import compensating taxes, *after a claim had been filed with the Commissioner under Title VII.*

the operation of Sections 902, 906 (b)–(g), and 907, but nothing to indicate that the former sections would not have been enacted without the latter (Br. 73–74).

Second. This Court has occasionally held inoperative certain aspects of a regulatory scheme because inseparably connected with an unconstitutional part of the Act. The theory is that one command falls with the other invalid command and the situation is as though there were no legislation. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312–317; *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362; *Hill* v. *Wallace*, 259 U. S. 44, 70, 71; cf. *Dorchy* v. *Kansas*, 264 U. S. 286, 290. But the Court has never, so far as we know, sanctioned the exercise of a power which requires the express consent of Congress merely on the ground that an unequivocal prohibition of its exercise was inseparably linked to an invalid provision.[8] For in such a case the one who attacks the statute cannot succeed merely by establishing that the legislation must be viewed as not enacted; he must go farther and find actual, unrepealed legislation authorizing the power whose exercise he seeks. And, as this Court said in *Insurance Co.* v. *Ritchie*, 5 Wall. 541, 544:

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[8] *National Life Ins. Co.* v. *United States*, 277 U. S. 508, seems to have allowed a tax deduction on the theory that it was separable from an invalid condition attached to it; this is not the same as though it had allowed the deduction on the theory that a legislative prohibition must be viewed as though not enacted.

> It is clear, that when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction. And it is equally clear, that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction.

We do not believe that the doctrine as to the consequences of inseparability can be stretched to the point that a court has power to exercise jurisdiction on the fiction that Congress has conferred this jurisdiction because its prohibition was inseparably tied to invalid provisions.

Any logic which leads to a result so plainly contradictory of the purpose of Congress must be mistrusted. This is doubly so in this case, for the logic which would permit disregard of Sections 904, 906 (a), and 910 is that which assumes that an earlier authority to hear the suit is somehow revived by reason of the constructive invalidity (because inseparable) of a removal of jurisdiction. This leads into almost ludicrous complications.

(1) The District Court can exercise jurisdiction only on the theory that Sections 904, 906 (a), and 910 fall with other provisions of Title VII which are held to be invalid. (2) But if this is the case, Section 901 must also fall. Section 901 repeals Section 21 (d) of the Agricultural Adjustment Act as amended by the Act of August 24, 1935 (Sec. 30, c. 641, 49 Stat. 750). Section 21 (d) (*infra*, p. 182) in substance forbids recovery of the Agricultural

Adjustment Act taxes unless the taxpayer shows that he bore the burden of the tax. It is inconceivable, in the face of the two similar enactments, that Congress would have repealed Section 21 (d) had not Title VII been enacted in its place. (See *infra*, pp. 91–96.) (3) Petitioner has not, of course, complied with the requirements of Section 21 (d) as to (a) establishing before the Commissioner that he bore the burden of the tax, or (b) filing a transcript of the record before the Commissioner as the record in the District Court. It results, even if Title VII be held invalid in its entirety, that the court has no jurisdiction. (4) Jurisdiction may thus be asserted only if Section 21 (d) as well as Title VII be held invalid.[7] (5) If the ordinary limitations upon appellate review be applied, the validity of Section 21 (d) may not be considered by this Court, since the petitioner does not challenge the validity of that statute in this Court. *Clark* v. *Williard*, 294 U. S. 211, 216; *Morehead* v. *Tipaldo*, 298 U. S. 587, 604–605. (6) If Section 21 (d) should, however, be held invalid there remains the problem of reviving the original scope of Section 24 (5) of the Judicial Code, which has in effect been declared inapplicable to Agricultural Adjustment Act taxes by two successive Acts of Congress. We do not see how this could be

[7] We respectfully refer the Court to the Government's brief in *Rickert Rice Mills, Inc.* v. *Fontenot*, 297 U. S. 110, No. 577, October Term, 1936, if the validity of Section 21 (d) should be considered in issue.

done; express authorization seems indispensable to a restoration of jurisdiction.

Thus, for the District Court to exercise jurisdiction in this case, it is necessary to disregard the express prohibition of Sections 904, 906 (a), and 910, because inseparably connected with invalid provisions of Title VII, and further to examine and hold unconstitutional an Act of Congress which has already been repealed. Such, we submit, is an extraordinary request to make of this Court when it is asked to confer jurisdiction on the District Court in the teeth of an Act of Congress. Yet such is the necessary basis of petitioner's contentions.

We believe that the unequivocal declaration of Congress that the District Courts should not have jurisdiction of suits of this nature is sufficient to dispose of this case. Even if the other provisions of Title VII should be thought inseparable, we do not see that their invalidity could operate to supply the Congressional authority which is necessary if the inferior Federal courts are to have power to act. However, in a question of this importance we prefer to err on the side of caution. In addition, we wish to make emphatically clear the fact that Title VII is not a naked exercise of the power of Congress to limit the jurisdiction of courts created by it, but also provides remedies for taxpayers which, if its adequacy were open to decision in this case, would be found to meet every requirement of the Constitution and of a government's

duty to deal fairly with its citizens. Accordingly there follows a full discussion of the power of Congress to provide this substitute method for the recovery of the taxes imposed under the Agricultural Adjustment Act.

II

Petitioner Has Not Stated a Cause of Action Against the Respondent Collector

If, for any reason, this Court should hold that the District Court might exercise jurisdiction notwithstanding the express withdrawal of jurisdiction found in Title VII, it then becomes necessary to consider that the complaint fails to state a cause of action. The District Court appears to have sustained respondent's demurrer on this ground (R. 38–39, 40).

Petitioner does not argue that his action is based on or can be maintained under the statutes of the United States (see Br. 11–12). It is quite plain that the complaint, which was framed to meet the requirements of Section 3226 of the Revised Statutes (*infra*, p. 180), does not state a cause of action under the existing statutes.

First. Section 903 (*infra*, p. 166) requires that a claim for refund be filed after enactment of the Revenue Act of 1936 and before July 1, 1937, if any refund is to be allowed. The bill contains no allegation that such claims were filed and, indeed, it affirmatively appears that the claims upon which

suit was brought were filed on June 12, 1935, and denied by the Commissioner on August 16, 1935 (R. 4, 11).

Second. Section 902 (*infra*, p. 165) provides in substance that no refund shall be made or allowed unless the claimant establishes to the satisfaction of the Commissioner or the court that he bore the burden of the tax. The bill contains no allegation that would serve to show compliance with this condition precedent.

Third. Section 910 (*infra*, p. 178) provides that no collector shall be liable for any act done in the collection of Agricultural Adjustment Act taxes, or the recovery of any of those taxes which were paid into the Treasury, if the collector acted in performance of his official duties or under the direction of the proper Government officers.[8]

It is settled beyond dispute that a statutory action for the recovery of Federal taxes cannot succeed unless there has been full and exact compliance with the procedural and substantive provisions upon which the right of action is conditioned: "Men must turn square corners when they deal with the Government." *Rock Island R. Co.* v. *United States*, 254 U. S. 141, 143; see also *Cheatham* v. *United States*, 92 U. S. 85, 88–89; *United States* v. *Michel*, 282 U. S. 656, 659. The rule is as fully applicable when suit is brought against the Collector as when it is brought against the

[8] This provision has also been treated as depriving the District Court of jurisdiction. See footnote 2, *supra*, p. 19.

United States. *The Collector* v. *Hubbard*, 12 Wall. 1, 14–15; *Arnson* v. *Murphy*, 109 U. S. 238, 243; *Savings Institution* v. *Blair*, 116 U. S. 200, 205–206; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 429–430; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 403. Nor does it make any difference that the conditions of suit are imposed after the cause of action had accrued under the earlier statutes. *The Collector* v. *Hubbard*, *supra*, 14–16; *Graham & Foster* v. *Goodcell*, *supra*, 429–430; *United States* v. *Jefferson Electric Co.*, *supra*, 401–402.

It is thus plain that Sections 902, 903, and 910 must each be held unconstitutional if petitioner is to secure reversal of the decision below. (1) Section 903 is admittedly a procedural adjunct of Section 902 and need not be discussed separately. (2) Section 910 of itself is sufficient to bar this action if it be viewed as an assertion of the sovereign's immunity to suit. Since Congress has provided an adequate remedy in place of that against the Collector, it is unnecessary to decide this case on the ground of the sovereign immunity (see *infra*, pp. 72–77). It should, however, be noted that the decision below cannot be reversed without a decision that the Government has not the same control over suits against the Collector that it has over suits against itself. (3) Section 902, and other aspects of the remedy provided by Title VII, are

fully discussed in later portions of this brief (*infra*, pp. 107–164).

Before proceeding with a discussion of the constitutionality of the remedy provided by Title VII for the recovery of Agricultural Adjustment Act taxes it is first necessary to consider at some length two points strenuously argued by petitioner and *amici curiae*. The first deals with a special immunity supposed to be lent the cause of action against the Collector because it is said to be based on the common law. The second asserts a vested right in the particular cause of action which accrued to petitioner prior to the enactment of the Revenue Act of 1936. We discuss these contentions in the next two sections of our brief.

III

The Complaint Does Not and Cannot State an Action at Common Law

Petitioner and *amici curiae* insist that the action against the Collector is one which is granted by the common law. From this they draw three conclusions. (1) The "vested right of action" runs against the Collector personally and cannot be subjected to the control which the Government exercises over suits against itself (Br. 18–19). (2) Maintenance of the right of action against the individual officer is essential to the continuation of constitutional government (Br. 19–23; Mr. Donald's Brief, *passim*). (3) There is also a sugges-

tion that a common law cause of action has a greater immunity to legislative control than does one based on a statute alone (Br. 26–27). These conclusions would not follow were the premise granted that the action is one to be found at common law. This, however, we do not discuss, for it seems clear that an action against the Collector may not be brought at common law under circumstances such as these.

1. THE ACTION AGAINST THE TAX COLLECTOR

A basic principle in the law of agency is that the agent of a known principal is not liable for the repayment of funds which he has transmitted to his principal. *Sadler* v. *Evans*, 4 Burr. 1984; *Bullar* v. *Harrison*, 2 Cowp. 565; *East India Co.* v. *Tritton*, 3 B. & C. 280; *White* v. *Bartlett*, 9 Bing. 378; *Hooper* v. *Robinson*, 98 U. S. 528, 540–541; *Baldwin* v. *Black*, 119 U. S. 643, 647. While the general rule is that notice of the claim before transmission by the agent to the principal is sufficient to hold the agent, it appears to be settled that a public agent who is under a duty to pay the money over irrespective of opposing claims will not be held. As early as 1792 Lord Kenyon, in *Greenway* v. *Hurd*, 4 Term R. 553, 555, with specific application to a crown revenue agent, said:

> If the defendant had not paid the money over, he would have subjected himself to punishment; and it would be hard that he should also be punished by an action if he did pay it over.

See also *Horsfall* v. *Handley*, 8 Taunt. 136, 138. When a test case was desired, the collector retained the money in his hands, with the consent of the Attorney General. *Campbell* v. *Hall*, 1 Cowp. 204. And in *Whitbread* v. *Goodsbank*; 1 Cowp. 66, 69, Lord Mansfield insisted that the record show a similar action was a consent suit, else "it might be of great inconvenience if this case should hereafter be made a precedent."*

This rule has been fully accepted and often applied by this Court. *Elliott* v. *Swartwout*, 10 Pet. 137, was decided in 1836. At that time the Collector was under no duty to pay into the Treasury taxes paid under protest. This Court held that illegal taxes paid under protest could be recovered from the Collector, even though he had paid them into the Treasury, while taxes whose payment was not protested could not be recovered from the Collector after payment into the Treasury. In consequence of Swartwout's subsequent and natural re-

* These early cases seem still to be the law. The absence of more recent cases may be traced to the availability of special statutory remedies. See, for example, 8 & 9 Geo. V, c. 40, Secs. 147–151; 57 & 58 Vict., c. 30, Sec. 8 (12); 23 & 24 Geo. V, c. 36. It is significant that, in numerous cases attempting to bring a petition of right or mandamus to recover taxes (remedies conditioned upon the absence of another remedy), the courts have never suggested the availability of assumpsit. *The Queen* v. *The Commissioners*, 12 Q. B. D. 461; *Holburn Viaduct Land Co.* v. *The Queen*, 52 J. P. 341; *Commissioners* v. *Pensel* [1891], A. C. 531; *Malkin* v. *King*, 2 K. B. 886; *William Whitley, Ltd.* v. *Rex*, 127 L. T. 619; *Bristol Channel Steamers, Ltd.* v. *The King*, 40 T. L. R. 550.

fusal to pay protested taxes into the Treasury, coupled with his regrettable tendency to speculate with public funds (see *Barney* v. *Watson*, 92 U. S. 449, 452; *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272, 275), Congress in 1839 provided (c. 82, 5 Stat. 339) that all taxes should be paid into the Treasury, irrespective of protest, and provided for the refund of illegal taxes by the Secretary of the Treasury. The effect of this Act was considered in *Cary* v. *Curtis*, 3 How. 236. The Court held that an action of assumpsit could no longer be brought against the Collector. Since he was under a duty to pay the money over to his principal, the law would not imply a promise to the taxpayer that it would be refunded if illegal. The reasons which compel this result are perhaps best stated in *Curtis's Administratrix* v. *Fiedler*, 2 Black. 461, 478:

> *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation. Such a promise, says the Court, is always charged in the declaration, and must be so charged in order to maintain the action. But the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law. Collectors under the act referred to were re-

> quired to pay all moneys received for unascertained duties or for duties paid under protest into the Treasury of the United States, and consequently this Court held that in a case arising under that law, where that duty had been performed by the collector, the law would not imply a promise on his part to pay the same back to the importer, because he was under no obligation to pay the money twice, and to have paid the same back to the importer in the first place would have been contrary to his official duty as prescribed by an Act of Congress. * * *.

It is plain that any other result would do violence to the equitable principles upon which the action for money had and received is based. *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 402–403; *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 309–310.

This Court has many times reaffirmed the principle that there can be no common law action against a Collector for the recovery of taxes after he has paid them into the Treasury pursuant to his statutory duty, and that whatever remedy the taxpayer may have is solely the creation of the statute.[10] *Nichols* v. *United States*, 7 Wall. 122, 126–127;

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[10] The Act of February 26, 1845, c. 22, 5 Stat. 727, enabling suit to be brought against the customs collector, was passed shortly after the decision in *Cary* v. *Curtis*, *supra*, because the Act of 1839 "was not intended to bar the right of the importer to maintain a suit at law for the recovery of duties illegally collected." 14 Cong. Globe 195, 28th Cong., 2d Sess.

Barney v. *Watson*, 92 U. S. 449, 452; *Arnson* v. *Murphy*, 109 U. S. 238, 240, 243; *Auffmordt* v. *Hedden*, 137 U. S. 310, 329; *Schoenfeld* v. *Hendricks*, 152 U. S. 691, 693. The principle is as fully applicable to suits against the collectors of internal revenue as to those against the collectors of customs. *Philadelphia* v. *Collector*, 5 Wall. 720, 731–735; *The Collector* v. *Hubbard*, 12 Wall. 1, 12–14; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382–383. See also *Ex parte Bakelite Corp.*, 279 U. S. 438, 451; *Crowell* v. *Benson*, 285 U. S. 22, 50–51.

These decisions are unequivocal. Their principle, that there can be no common law action in assumpsit against the Collector for the recovery of taxes paid into the Treasury, has expressly been stated by this Court in numerous cases extending over a period of almost a century. The proposition must be taken to be settled.

Petitioner, in his attempt in effect to secure reversal of this line of authority, relies on several decisions of this Court which emphasize that the action against the Collector has the procedural consequences of a suit against an individual rather than one against the Government. We do not, of course, question the soundness of these decisions; if Congress chooses to extend a remedy in the form of a personal action, it must be taken to have intended that the ordinary procedural incidents of such an action would be operative. Thus, in *Patton* v. *Brady*, 184 U. S. 608, 612–615, this Court held that after the death of the Collector the suit could

be revived against his executrix. Correlatively, it held in *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1 (followed in *Union Trust Co.* v. *Wardell*, 258 U. S. 537, 542), that the action could not be brought against the Collector's successor in office. In *Sage* v. *United States*, 250 U. S. 33, 37, a judgment against the Collector was held to be no bar to suit against the United States for recovery of the balance of the taxes overpaid. In *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308, 312, it was held that a judgment against the Collector was not *res judicata* against the United States. On the other hand, in *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, 627, the Collector was held estopped by a judgment against the United States or his superior the Commissioner. Finally, in *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 430–431, this Court stated *obiter* that the action against the Collector was not subject to the same control by the sovereign as one against the United States.

It is plain that none of these decisions can be stretched into a holding that the suit against the Collector is one authorized by the common law alone. Apart from the dictum in the case last discussed, which can have no bearing upon the statutory or common law nature of the action, the cases merely adopt the natural procedural consequences of the statutory choice of a suit against the Collector. It is true that a number of these cases state that the action is "personal." *Sage* v. *United States, supra*, 37; *Smietanka* v. *Indiana Steel Co.*,

supra, 4; *Graham & Foster* v. *Goodcell*, *supra*, 430; *Tait* v. *Western Maryland Ry. Co.*, *supra*, 627. This by no means is a decision that the action is one which is recognized by the common law. A statutory right of action, as fully as one at common law, may be "personal" rather than against the Government. *Patton* v. *Brady* allowed revivor against the executrix because of the implied promise upon which the action of assumpsit was based. This decision cannot be taken to overrule the established principle of *Cary* v. *Curtis*, *supra*, and can mean no more than a recognition that Congress had chosen to adopt the fiction of an implied promise. *Sage* v. *United States*, *supra*, 37, and *Smietanka* v. *Indiana Steel Co.*, *supra*, 4, emphasize that the Government is not certain to pay any judgment entered against the Collector, since a certificate of probable cause or action in the course of official duty is required. But this in no manner serves to make the action one at common law and, in any event, this Court has since held that the certificate must issue as of right and that the Government's lack of privity is nominal only. *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 381–383. It results that not only the actual decisions but the reasoning of these cases is wholly compatible with the established doctrine that the suit against the Collector is a statutory rather than common-law cause of action.

The complaint makes no allegation that the respondent collected these taxes outside his official duties, or that the collection was not authorized by

the Agricultural Adjustment Act. Irrespective of any protest by petitioner the respondent was under statutory duty to make daily payments of these taxes into the Treasury. Section 3210 of Revised Statutes; U. S. C., Title 26, Sec. 1761. Repeated decisions of this Court demonstrate that the taxpayer cannot bring a common law action in such a situation. It should be noted, moreover, that a part of the taxes here involved were not paid under protest (R. 19).

It is unnecessary to consider whether detinue, or possibly replevin, could be brought, for here the Collector is not in possession of goods distrained or specific moneys collected under the authority of the Agricultural Adjustment Act. It is also unnecessary to consider whether trover would lie had the taxes been collected by the seizure of chattels. See *Cary* v. *Curtis,* 3 How. 236, 250. These actions, of course, would so rarely be available that they may be dismissed without further discussion. Petitioner does not argue that he can frame an action in the form of detinue, replevin, or trover, but merely that the possibility exists (Br. 26).

2. OFFICIAL LIABILITY GENERALLY FOR ACTING UNDER AN UNCONSTITUTIONAL STATUTE

We freely concede that the Collector is liable if he acts outside the scope of his authority and collects, under the color of his office, taxes which are plainly unauthorized. See *In re Fassett,* 142 U. S. 479, 487; *De Lima* v. *Bidwell,* 182 U. S. 1, 179. In this regard the Collector is in the same

position as is any other officer of the Government. Section 989 of the Revised Statutes has always excluded collections made in a spirit of individual oppression from the operation of its provisions for reimbursement of the Collector by the Government. The Revenue Act of 1936 does not attempt to remove this liability; Section 910 merely removes the Collector's liability for collecting and paying into the Treasury Agricultural Adjustment Act taxes under the authority of the statute or at the direction of his superior officers.

However, the bill alleges that the taxes were collected under the Agricultural Adjustment Act (R. 2, 9) and there is no suggestion but that the respondent's action was in performance of his official duties under that Act. An action at common law can, therefore, be maintained only if the Collector is placed in the same position as though he had acted in a spirit of malice, personal oppression, or reckless disregard of his duties, because this Court subsequently declared the taxes unconstitutional in *United States* v. *Butler*, 297 U. S. 1. We submit that any such result is contrary to the decisions of this Court and to the better considered decisions of other courts and might lead to the breakdown of governmental administration.

1. The action against the public officer for wrongs committed under the color of authority is an expression of the great principle of Anglo-American law which subjects public officers as well as citizens to the sanctions of the law. It is designed to protect the citizen from arbitrary action

from an especially dangerous source.[11] As Chief Justice Holt said in *Ashby* v. *White*, 22 Ld. Raym. 938, 956:

> If publick officers will infringe mens rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences.

Lord Mansfield, in *Mostyn* v. *Fabrigas*, 1 Cowp. 161, 175, expressed the matter with even greater vigor:

> Therefore to lay down in an English court of justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the great seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.

2. The translation of the English doctrine into American law admits, in theory, of either of two

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[11] It is true that a direction by his superior grants no immunity to the officer, for as "the King can not do wrong", he "cannot authorize wrong". *Money* v. *Leach*, 3 Burr. 1742; *Sultan* v. *Johnstone*, 1 Term. R. 493; *Feather* v. *The Queen*, 6 B. & S. 257, 296–297; *Cobbett* v. *Grey*, 4 Exch. 729; *Johnstone* v. *Pedlar* [1921] A. C. 262, 271, 275, 295. But it is significant that these cases hold that both the officer who actually commits the wrong and the superior who directed him are subject to liability. In other words, the proximate wrongdoer is being punished not merely for proceeding upon defective authority but because he has participated in a disobedience of the law.

results. On the one hand, its application might be made in the light of the statement sometimes made, in regard to different situations, that an unconstitutional statute is void *ab initio,* and as though it had never been enacted. *Norton* v. *Shelby County,* 118 U. S. 425, 442; *Chicago Ry. Co.* v. *Hackett,* 228 U. S. 559, 566. If this doctrine were applied literally to the officer's liability for acting under an unconstitutional statute it would be held that he was acting without any authority whatever and his action would thus be the act of an individual bent on oppression. On the other hand, a less superficial approach would start from the reason lying back of the English rule and would find no danger of individual oppression in obedience to a statute subsequently held unconstitutional. It would recognize that the statute was in fact enacted and that no subordinate officer can be expected to set himself up as constitutional arbiter on the validity of an Act passed and thought constitutional by the Congress. Under this approach, the officer who enforces an unconstitutional Act would not be held personally liable.

The American cases have adopted both theories. Their results are divergent and defy even approximate reconciliation. The opposing doctrines in the state cases may be illustrated by the reasoning of two cases. In *Fisher v. McGirr,* 1 Gray 1, 46 (Mass.), the court said:

> The law relied on for a justification, being void, gave the magistrate no jurisdiction

> and no authority to issue the search warrant, the officer cannot justify the seizure under it, and therefore an action lies against him for the taking.

Against this may be placed the approach of the court in *Dexter* v. *Alfred,* 64 Hun. 636, 638 (N. Y.):

> It was no part of the duty of the commissioner of highways to decide whether the law in question was or was not constitutional. His duty was to execute the law as he found it.

The state cases seem, roughly, to be divided about equally between these two views and we believe that neither can be said to be supported by the weight of authority. It seems that nothing can be gained by any extended analysis of their holdings.[12]

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[12] The most extensive analysis is found in Field, *Effect of an Unconstitutional Statute*, pp. 119–149; also published as *Unconstitutional Statutes and Public Officers*, 77 U. of Pa. Law Rev. 155. He comes to the conclusion that the cases are irreconcilable, but that there is a tendency to exonerate the officer (1) in the more recent cases, and (2) when he acts in a quasi-judicial capacity. It should also be noted that his examination indicates that tax collectors are generally held liable. See, however, the additional cases cited below.

In addition to the numerous cases cited by Field, the following may also be noted: *American Bonding Co.* v. *People*, 53 Col. 512 (tax collector not liable); *Phelan* v. *San Francisco*, 120 Cal. 1 (tax collector not liable); *Hartford Fire Ins. Co.* v. *Jordan*, 168 Cal. 270 (tax collector not liable); *Calhoun* v. *Little*, 106 Ga. 336 (magistrate not liable); *Anheuser-Busch Brewing Ass'n* v. *Hammond*, 93 Iowa 520 (marshal and constable not liable); *Smith* v. *First Nat. Bk. of Tecumseh*, 17 Mich. 479 (tax collector liable); *State* v.

3. We submit that this Court has definitely adopted the view that the officer is not to be viewed as a personal trespasser merely because of the fiction that an unconstitutional statute was never enacted.

First. In *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110, 113, this Court said that, in the light of its earlier decision in *United States* v. *Butler*, 297 U. S. 1, "If the respondent should *now* attempt to collect the tax by distraint he would be a trespasser." (Italics added.) The implication seems inescapable that, as to taxes collected prior to the *Butler* decision, the collector would not have been a trespasser. In *Burrill* v. *Locomobile Co.*, 258 U. S. 34, 38, the Court held that a state could make exclusive the remedy against itself for the collection of an unconstitutional tax. If there were any doubt, it would be removed by the decision in *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382, where this Court said:

> A suit against a Collector who has collected a tax in the fulfilment of a ministerial duty is today an anomalous relic of bygone modes of thought. *He is not suable as a trespasser*, nor is he to pay out of his own purse. [Italics added.]

Second. It is the settled doctrine of this Court that a public official has no standing to attack the constitutionality of a statute which he is under a

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McNally, 34 Me. 210 (magistrate not liable); *Logan City* v. *Allen*, 44 P. (2d) 1085 (Utah) (tax collector not liable); *Lang* v. *Mayor*, 74 N. J. L. 455 (police commissioner not liable).

duty to enforce."[13] *Caffrey* v. *Oklahoma Territory*, 177 U. S. 346, 348; *Smith* v. *Indiana*, 191 U. S. 138, 148–149; *Braxton County Court* v. *West Virginia*, 208 U. S. 192, 198; *Marshall* v. *Dye*, 231 U. S. 250, 257–259; *Stewart* v. *Kansas City*, 239 U. S. 14, 16; *Columbus & Greenville Ry.* v. *Miller*, 283 U. S. 96, 99–100. These cases were grounded solely upon an absence of personal interest, although the Court in *Smith* v. *Indiana*, *supra*, 148, also said in dictum:

> * * * there are many authorities to the effect that a ministerial officer, charged by law with the duty of enforcing a certain statute, cannot refuse to perform his plain duty thereunder upon the ground that in his opinion it is repugnant to the Constitution.

The holding that an absence of personal interest precludes attack on the statute necessarily implies that the officer may enforce or obey the statute without fear of personal liability. For, if he should refuse to enforce or obey a constitutional statute, there seems to be no question but that, in addition to incurring whatever penal sanctions the government might invoke, he would be liable to any person injured by his refusal. *Morris* v. *People*, 3 Denio. 381 (N. Y.); *Clark* v. *Miller*, 54 N. Y. 528. If the officer were to be held liable, on the other hand, were he to enforce or obey a statute which

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[13] The earliest of this line of cases is to the contrary. *Huntington* v. *Worthen*, 120 U. S. 97, 101–102. It has, however, necessarily been overruled by the subsequent cases discussed in the text.

was later held unconstitutional, it is plain that he would have no choice which would surely exempt him from liability. The denial of a personal interest in the officer who attacks the statute is thus the equivalent of a holding that he is not to be liable for enforcing an unconstitutional statute. It is significant that *Huntingdon* v. *Worthen*, 120 U. S. 97, 101–102, which was in effect overruled by the line of cases beginning with the *Caffrey* and *Smith* cases, stated that "an unconstitutional statute is not a law; it binds no one, and protects no one." The reversal of its result must imply a disapproval of its premise.

Third. It has been established by repeated decisions of this Court that allegations that a tax is unconstitutional will not serve to bring a bill to enjoin its collection within the equity jurisdiction of a Federal court. *Shelton* v. *Platt*, 139 U. S. 591, 600; *Pittsburgh Ry.* v. *Board of Public Works*, 172 U. S. 32; *Pacific Whaling Co.* v. *United States*, 187 U. S. 447, 451, 452; *Dodge* v. *Osborn*, 240 U. S. 118, 121; *Bailey* v. *George*, 259 U. S. 16, 20. If this Court were of the opinion that an unconstitutional statute was void *ab initio* for all purposes, the collector, in threatening to collect the taxes, would be threatening to commit a serious trespass which could be enjoined. *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110, 113. It must follow that, whether or not the statute is ultimately held to be constitutional, the tax collector is acting, not as an individual who is threatening the use of force and

distraint toward an end of private or malicious oppression, but as an agent of the government and endowed with its authority.

Fourth. The exaction, under statutory authority, of a tax later determined to be unconstitutional should place the Collector in no worse position, surely, than the ministerial exaction in good faith of an excessive or otherwise unauthorized tax. In each case the Collector is acting under supposed authority which later develops to be lacking. In the case of an excessive or illegal tax, the rule is settled that the Collector who distrains in order to collect such a tax is not personally liable as a trespasser. *Erskine* v. *Hohnbach*, 14 Wall. 613, 616–617; *Haffin* v. *Mason*, 15 Wall. 671, 675; *Harding* v. *Woodcock*, 137 U. S. 43; *Stutsman County* v. *Wallace*, 142 U. S. 293, 309–310; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 381. In the *Woodcock* case the Court said (p. 48):

> Nor could the collector consider whether in the pending action it might not be ultimately determined that the taxes were illegal which he was endeavoring to collect. He had completed his duty more than a year before that decision was rendered. Had the judgment of their illegality been pronounced before the enforcement of the assessment by the collector, and been brought to his notice, a different question might possibly be raised.
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> What remedy the plaintiff may have for the loss of his property or for the amount

> of the proceeds obtained on its sale, we are not called upon to determine in this case. There may be, perhaps, a claim against the government. All that we decide is, that a liability cannot be fastened upon the collector, a ministerial officer, for the enforcement of an assessment for taxes regular on its face, made by the Commissioner of Internal Revenue. Of such an officer the law exacts unhesitating obedience to its process.

In the *Erskine* case the Court pointed out the analogy to the sheriff or marshal who levies execution under a writ valid on its face. Whatever the illegality which lies back of the writ, the executing officer cannot be held personally liable. *Bryan* v. *Ker*, 222 U. S. 107, 113–114. It must, in our view, follow that the Collector is not a trespasser in collecting an unconstitutional tax, any more than in the case of taxes otherwise illegal.

Fifth. The action of an officer in enforcing an order or a statute may be illegal when done but may be cured by ratification if Congress could originally have authorized it. *Hamilton* v. *Dillin*, 21 Wall. 73, 96; *Tiaco* v. *Forbes*, 228 U. S. 549, 556; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226, 232; *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8, 11; *Hodges* v. *Snyder*, 261 U. S. 600, 603; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 429; see also *United States* v. *Heinzen*, 206 U. S. 370, 382; *Swayne & Hoyt, Ltd.* v. *United States*, No. 494, October Term, 1936. If petitioner's argument (Br. 13–15) is sound that a cause of action against the officer cannot be di-

vested once it has accrued, it must follow that the officer prior to the ratification was not liable for action taken in the course of his official duties.

Petitioner relies upon several cases dealing with suits against collectors of state taxes (Br. 20–22). None is a decision that the mere illegality of the collection, as subsequently determined, converts the collector into a trespasser.

Thus, *Poindexter* v. *Greenhow*, 114 U. S. 270, was an action of detinue, which possibly might be brought against the Collector if the circumstances were similar. There a state tax collector had seized property on the nonpayment of taxes; the plaintiff had tendered coupons on bonds issued by the state and guaranteed to be accepted for taxes. The Court held that the action could be maintained, Chief Justice Waite and Justices Bradley, Miller, and Gray dissenting. We admit that the language in the opinion which petitioner quotes (Br. 20–21) offers it support. There is, however, no occasion to consider whether it can be squared with subsequent decisions of this Court, for the opinion is based upon the premise that the plaintiff was seeking constitutional protection for rights based on a contract, for breach of which there was no right of action against the State. It therefore expressly distinguished the case presented by suits for the refund of taxes (pp. 300–301). So, too, in *Atchison Ry. Co.* v. *O'Connor*, 223 U. S. 280, 285, the suit

was for the recovery of taxes still held by the collector.

Scott v. *Donald,* 165 U. S. 58, was a suit in which a constable was held liable for destroying liquor under the pretended authority of an unconstitutional statute. It is not authority for petitioner. The officer was acting willfully and maliciously (see pp. 82, 86). Moreover, only passing attention was paid to the liability of the officer, and that only in regard to the question of whether he was liable for exemplary damages.

Cruickshank v. *Bidwell,* 176 U. S. 73, 81, is, if anything, authority for the Government. It merely refused to enjoin the enforcement of a customs law alleged to be unconstitutional.

Finally, it must be noted that the broad dicta found in a few of the cases, that an unconstitutional statute is wholly void *ab initio,* and binds or protects no one, have never been used by this Court, so far as we know, to impose personal liability upon an officer. *Norton* v. *Shelby County,* 118 U. S. 425, held that an unconstitutional agency could not bind the county on a subscription to railroad bonds. *Huntington* v. *Worthen,* 120 U. S. 97, subsequently overruled (see *supra,* p. 49), held that a state officer had standing to attack the validity of a state statute. *Hopkins* v. *Clemson College,* 221 U. S. 636, held that a state agricultural college was liable for flooding the plaintiff's lands. *Chicago Ry. Co.* v. *Hackett,* 228 U. S. 559, held that

the First Employers' Liability Act did not supersede state statutes because it was unconstitutional.

We therefore submit that the only conclusion which can be drawn from the decisions of this Court is that the Collector who enforces an Act of Congress cannot be held personally liable as a trespasser even though the Act subsequently be held unconstitutional.

4. If there were any doubt on the question, the briefest attention to the consequences of a decision holding the officer personally liable must compel a decision to the contrary. In case of collectors of internal revenue, the judgments would probably be paid by the United States under Section 989 of the Revised Statutes, since the judge may grant a certificate upon a showing that the Collector acted under the direction of his superior officers. But the question is far larger than that immediately presented, since the other officers of the Government do not have a similar protection.

The duty of the subordinate official is to enforce the law as it is enacted. If the law be invalid, the fault lies with the Congress and not with the official. If each of the thousands of Government officials charged with the enforcement or the application of the law to the citizens were to be held liable for obeying an act of Congress which might later be held invalid, the result would of necessity be the partial breakdown of government, except so far as this Court had expressly upheld each law whose constitutionality was questioned. Our Con-

stitution knows only one body, the judiciary, that is empowered to take issue with the Congress on the constitutionality of its enacted legislation. It is a rule of absolute necessity that of ministerial officers "the law exacts unhesitating obedience to its process." *Harding* v. *Woodcock,* 137 U. S. 43, 48. Orderly government requires that subordinate officials devote their efforts not to the subtle dialectics of constitutional law but to the enforcement of the laws as found in the statute books.

A decision based on these principles does not present the threat to the liberties of the citizen which petitioner seems to envision. If regard be had to the reason of the rule of personal liability of officers, to prevent individual oppression under color of office, the needs of the Government and of the citizen can both be reconciled. Such has been the path chosen by two Attorneys General. In 10 Op. A. G. 56, 61, Attorney General Bates said:

> There may possibly arise cases of plain and obvious conflict between the provisions of the Constitution and the provisions of a statute. In such cases, there is no room for construction, no ground for argument; and in all such cases, not only the judiciary Department, but every Department, and indeed every private man who is required to act upon the subject matter, must determine for himself what the law of the land, as applicable to the case in hand, really is. * * *

> This is predicated of cases where the conflict of law is plain and obvious. But in cases in which the conflict of law is doubtful, and its existence has to be made out by argument, I think it is far more prudent for the administrative officer to follow the statute, and leave the party who may be dissatisfied with the decision to seek his remedy in the courts. * * *

And Acting Attorney General Davis, in 31 Op. A. G. 213, 215, said:

> I concur in the view thus expressed that, unless the conflict between the law in question and the Constitution be plain and obvious, it is the duty of the administrative officer to comply with the provisions of the statute, leaving the question of its constitutionality to be determined by the courts.

We therefore submit that the doctrine of personal liability of public officers is inapplicable where the action results not from disobedience of enacted law but from enforcement of a law subsequently held invalid. In the latter case the officer himself presents no threat to the rights of the citizen. He acts under command of the legislature itself, and any right to redress must of necessity lie against the Government alone. A decision to the contrary would necessarily place the palpable fiction that an unconstitutional statute was never enacted above the needs of an orderly administration of government.

IV

Petitioner Has No Vested Right in the Earlier Procedure and Congress Has Full Power to Substitute a New Remedy for the Refund of Taxes

This section is devoted to answering petitioner's argument (Br. 10–18) that it had a vested right in the procedure for the refund of taxes which existed at the time it paid its taxes, or at the time the Commissioner denied its claim for refund. For, just as the nature and adequacy of the remedies provided by Title VII are immaterial if the Government should prevail in its contention as to the jurisdiction of the District Court, so too are they immaterial if petitioner should prevail in its contention that any change in the remedies existing for the refund of Agricultural Adjustment Act taxes was forbidden by the Constitution.

The ordinary procedure for the recovery of an overpayment of Federal internal revenue taxes, whose refund was denied by the Commissioner, was to bring suit either against the Collector or against the United States (R. S., Secs. 989, 3220, 3226; Judicial Code, Sec. 24 (5), (20); U. S. C., Title 26, Secs. 482, 1670 (b), 1672–1673, Title 28, Sec. 41 (5), (20)). In the case of certain manufacturer's excise taxes, the taxpayer could recover only by showing, in substance, that he bore the burden of the tax (Section 424, Revenue Act of 1928, c. 852, 45 Stat. 791; Section 621, Revenue Act of 1932,

c. 209, 47 Stat. 169); otherwise the taxpayer was entitled to recover on mere proof of payment in excess of the amount legally due.

Congress changed this system so far as the recovery of taxes paid under the Agricultural Adjustment Act is concerned. Section 21 (d) of that Act (*infra*, p. 182) provided, in substance, that recovery of these taxes would be allowed only so far as the taxpayer showed that he bore the burden of the tax himself. Title VII of the Revenue Act of 1936 in Section 902 continued this basic principle and, in Section 907, provided means by which to determine whether or not the taxpayer had borne the burden of the processing tax. In Section 910 it removed the liability of the Collector for the collection of taxes under the authority of the Agricultural Adjustment Act, thus leaving a proceeding against the Government as the exclusive remedy in the event the Commissioner should deny a claim for refund. In the case of floor stocks and import compensating taxes, this denial would permit suit in either the District Court or the Court of Claims under Section 905. In the case of processing taxes, review of the Commissioner's disallowance of a refund claim occurs in the first instance in the Board of Review, established in the Treasury Department by Section 906. This administrative tribunal, by a procedure analogous to that of the Board of Tax Appeals, is to hear the controversy between the Commissioner and the taxpayer and

must make findings of facts and conclusions of law. Either the Commissioner or the taxpayer may petition a circuit court of appeals or the Court of Appeals for the District of Columbia for a review of questions of law; this Court may, upon petition for a writ of certiorari, review the decisions of those courts.

1. THE PETITIONER CONFUSES RIGHT WITH REMEDY

We believe that, properly speaking, there is no controversy between the petitioner and the Government as to the power of Congress to change the remedies available to taxpayers who are entitled to a refund. Thus, petitioner concedes (Br. 15) "the States or the Federal Government can go far, consistently with due process of law, in changing court procedures and the remedies provided for the enforcement of vested rights." Its argument appears to be that its "vested right" to the recovery of all Agricultural Adjustment Act taxes cannot constitutionally be destroyed by a purported change in procedure (see Br. 15–18).

If by vested right the petitioner means one which is protected by the Constitution, we are in complete agreement. By this view, the issue then becomes not whether the Congress can interfere with "vested rights" but whether or not the petitioner has a constitutional right to recover back illegal taxes whose economic burden he has not borne. If there is such a constitutional right, the provisions of Title VII would be invalid whether enacted be-

See 902

fore or after the taxes were paid. If there is no such constitutional right, it is immaterial whether Title VII was enacted before or after petitioner's claim accrued.

However, we are not sufficiently certain that we understand petitioner's position to warrant proceeding at once to the merits.[14] Accordingly, the next division of this section demonstrates with perhaps unwarranted elaboration that Congress has a full power at any time to change the remedies open to taxpayers for recovery of taxes paid.

Before proceeding to that discussion, however, we wish to point out that, so far as petitioner's claim is based upon a right protected by the Constitution, Title VII neither impairs nor changes that right. At the time these taxes were paid, petitioner was entitled under the existing statutes to recovery of their full amount if illegal. So far as this amount represented taxes whose economic burden petitioner had borne, it may here be assumed that this was a constitutional right. So far as it represented taxes whose burden had been borne by others, the petitioner had no constitutional right

[14] Thus, petitioner states (Br. 14) that the application of the principle of *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, has no application to its argument based on vested rights. And the very emphasis which it places on the fact that its claim accrued prior to the enactment of the Revenue Act of 1936 indicates that the change itself somehow lends a vulnerability to a remedy otherwise immune to constitutional attack.

to their recovery. *United States* v. *Jefferson Electric Co.*, 291 U. S. 386; see *infra*, pp. 120–139.

Title VII in no sense impairs the right to recover the taxes for which petitioner may claim constitutional protection. Under the earlier procedure the taxpayer sought to reach the Treasury of the United States, whether he brought suit against the Collector or the United States. This he may still do. Under the earlier procedure, the taxpayer obtained a money judgment supported by the faith and credit of the United States. This he may still have. Under the earlier procedure the taxpayer could obtain judicial determination of his right to a refund. This is still open to him, with the sole exception that the Commissioner's denial of processing tax refund claims is initially to be heard by an administrative tribunal. Thus, prior to the enactment of Title VII, taxpayers had the choice of two routes by which to reach the Treasury of the United States. Congress has withdrawn one, the suit against the Collector, and has left the other without modification relevant to petitioner's constitutional rights.

2. CONGRESS HAS COMPLETE POWER AT ANY TIME TO CHANGE THE TAXPAYER'S REMEDY

Petitioner's argument appears, however, to be in part that the substitution of a changed remedy was beyond the constitutional power of Congress merely because of a vested right in the continuation of the remedies existing at the time he paid the taxes or was in a position to bring suit for their

recovery. (Br. 15–18.) This argument is apparently based on the proposition that the fact of change alone makes the new remedy unconstitutional. The contention ignores the thoroughly settled principle of constitutional law that the legislature has complete authority to substitute one remedy for another, whether between private citizens or against the Government.

1. The general principles are well established. No one has a vested right in any mode of procedure or in any particular remedy. *Railroad Co.* v. *Grant,* 98 U. S. 398, 401; *League* v. *Texas,* 184 U. S. 156, 158; *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 569; *Luria* v. *United States,* 231 U. S. 9, 26–27; *Crane* v. *Hahlo,* 258 U. S. 142, 147. Even under the additional limitation of the contracts clause, if the remedy which the state legislature substitutes is reasonable and adequate, none can complain because his expectation of having the old remedy available has been destroyed. *Oshkosh Waterworks Co.* v. *Oshkosh,* 187 U. S. 437, 439; *Home B. & L. Assn.* v. *Blaisdell,* 290 U. S. 398, 433; *Richmond Mortgage Corp.* v. *Wachovia Bank,* No. 235, October Term, 1936.

The doctrine of these cases has been applied in a wide variety of situations. We shall list a few of them by way of illustration. Congress has unquestioned power, even after final judgment has been rendered, to provide for appellate review. *Freeborn* v. *Smith,* 2 Wall. 160; *Stephens* v. *Cherokee Nation,* 174 U. S. 445. Statutes of limitation may

be modified even though the modification reimposes a liability thought to have been barred. *Campbell* v. *Holt*, 115 U. S. 620. The defense of usury may be eliminated retroactively. *Ewell* v. *Daggs*, 108 U. S. 143. Statutory provision for interest on unliquidated damages may be made applicable to prior breaches of contract. *Funkhouser* v. *Preston Co.*, 290 U. S. 163. The imposition of new procedural conditions to the power of creditors to bring suit offends against neither the contracts nor the due process clauses. *Oshkosh Waterworks Co.* v. *Oshkosh*, 187 U. S. 437; see *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 680. An ineffective registration of mortgages may be validated although it eliminates intervening judgment liens. *McFaddin* v. *Evans-Snider-Buel Co.*, 185 U. S. 505; *Watson* v. *Mercer*, 8 Pet. 88, 100. Nonjudicial forfeiture of lands for failure to pay the purchase price may be substituted for judicial forfeiture. *Wilson* v. *Standefer*, 184 U. S. 399; *Pittsburg Steel Co.* v. *Baltimore Society*, 226 U. S. 455; *Penniman's Case*, 103 U. S. 714. A mechanic's lien may be extended to cover the land as well as the building, even as against a prior mortgage. *Red River Valley Bank* v. *Craig*, 181 U. S. 548. The period necessary to give title by adverse possession may be reduced by the legislature. *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140; *Atchafalaya Co.* v. *Williams Co.*, 258 U. S. 190. Even after a judgment of condemnation, if the case is not finally closed, the legislature may destroy the power to

condemn or the mode of ascertaining damages. *Western Union Tel. Co.* v. *Louisville & Nashville R. Co.*, 258 U. S. 13; *Crane* v. *Hahlo*, 258 U. S. 142. Statutes providing a more expeditious or a wider enforcement of stockholder's liability, or adversely modifying the creditor's remedies against the stockholder, do not violate due process. *Bernheimer* v. *Converse*, 206 U. S. 516; *Shriver* v. *Woodbine Bank*, 285 U. S. 467, 479; *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 755; *Davis* v. *Mills*, 194 U. S. 451.

2. Title VII forbids suit against the Collector who acted in his official duty, and permits suit only against the United States. But the fact that the statute restricts the possible parties to the proceeding operates in no manner to limit the power of Congress to substitute this new remedy for the recovery of taxes collected under the Agricultural Adjustment Act. The precise question was considered in *Burrill* v. *Locomobile Co.*, 258 U. S. 34, where this Court considered, against objections based on the due process clause, a Massachusetts statute (Laws 1909, c. 490, Sec. 70) substituting a petition in the Supreme Judicial Court, with notice to designated state officers, in the place of a suit against the collector for the refund of taxes illegally collected from corporations.[15] See also *Southern*

[15] In the *Locomobile Co.* case the modification had been made before the taxes were paid, but the Court placed no reliance on this circumstance. In the *Southern Ry.* case the modification was made after the taxes were paid.

Ry. Co. v. *Query*, 21 F. (2d) 333, 346 (E. D. S. C.). The rule has been applied in numerous analogous situations. Stockholders' liability may be made enforcible by a receiver in place of creditors,[16] a state official may be given the exclusive power to institute receivership proceedings,[17] and various types of associations may be authorized to represent its members.[18] Government officials may be given sole power to act for private defendants or plaintiffs,[19] and administrators may be given the sole power to sue on probate bonds or to defend against foreclosure.[20] It is plain that the power of Congress to substitute a new remedy is in no manner limited by the fact that the nominal parties defendant may be different as a result of the fact that the collector may no longer be brought into court.[21]

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[16] *Henley* v. *Myers*, 215 U. S. 373; *Cowden* v. *Williams*, 32 Ariz. 407; see also *Pittsburg Steel Co.* v. *Baltimore Society*, 226 U. S. 455.

[17] *Pennsylvania* v. *Williams*, 294 U. S. 176, 186; *Grimes* v. *Central Life Ins. Co.*, 172 Ky. 18.

[18] *New Orleans Debenture Co.* v. *Louisiana*, 180 U. S. 320; *American Ry. Express Co.* v. *Asher*, 218 Ky. 172; *Grand International* v. *Green*, 210 Ala. 496, appeal dismissed, 265 U. S. 576; see also *Crawford* v. *Branch Bank of Mobile*, 7 How. 279.

[19] *Hines* v. *Collins*, 227 S. W. 332 (Tex.); *Montel & Co.* v. *Consolidated Coal Co.*, 39 Md. 164; *Gilpatric* v. *National Surety Co.*, 95 Conn. 10.

[20] *McCanghey* v. *Lyall*, 224 U. S. 558, 563; *Hayes* v. *Briggs*, 106 Me. 423.

[21] *International Steel Co.* v. *Surety Co.*, 297 U. S. 657, relied upon by petitioner (Br. 28), in no manner contra-

3. We have already demonstrated that petitioner's asserted cause of action is not one based on the common law (*supra,* pp. 35–57). But even if it were, there is no magic which inheres in a common law action and places it beyond the power of the legislature to control or abolish. The general power of the legislature to modify or abolish common law actions must be taken to be beyond question.[22] It has frequently been upheld by this Court. Thus, shippers who have been forced to pay an unreasonable rate were validly forced to go before the Interstate Commerce Commission instead of pursuing their common law right of action. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426. The railway postal clerk can by statute be forced to assume the status of a railroad employee in the place of his common law status as a passenger. *Price* v. *Pennsylvania R. Co.,* 113 U. S. 218; *Martin* v. *Pittsburg & Lake Erie R. Co.,* 203 U. S. 284. The state legislature may validly abolish all liability for torts committed

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dicts this principle; there a different obligation of a different party, substituted for a surety bond, was held to offend against the contracts clause, since it destroyed the right rather than merely changed the remedy.

[22] See, for example: the abolition of the action of detinue, *Troy Laundry Machinery Co.* v. *Carbon City Laundry Co.,* 27 N. M. 117; limitation of suits for trespass by animals, *Burnett* v. *Myers,* 42 S. D. 233, or for the recovery of usurious interest paid, *Crosby* v. *Bennett,* 7 Metc. 17; and the abolition of the liability of toll road proprietors toward the general public. *Williams* v. *Hingham &c. Corp.,* 4 *Pick.* 341.

in the course of the Civil War. *Freeland* v. *Williams,* 131 U. S. 405; *Louisiana* v. *Mayor of New Orleans,* 109 U. S. 285. Bank debtors may be subjected to summary judgment and attachment. *Bank of Columbia* v. *Okely,* 4 Wheat. 235, 245. The common law rights of the injured servant and his master have been subjected to a sweeping statutory modification, always with an elimination of certain of the employer's defenses and generally with a substitution of administrative for judicial proceedings. *New York Central R. Co.* v. *White,* 243 U. S. 188; *Hawkins* v. *Bleakly,* 243 U. S. 210; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Ward & Gow* v. *Krinsky,* 259 U. S. 503; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152; *Arizona Copper Co.* v. *Hammer,* 250 U. S. 400; *Dahlstrom Metallic Door Co.* v. *Industrial Board,* 284 U. S. 594; *Crowell* v. *Benson,* 285 U. S. 22.

4. We take it, then, as settled that the legislature has full power to substitute one remedy for another, even though the parties may be different and even though the new action be a statutory substitute, whether administrative or judicial, for a common law cause of action. Petitioner's argument to the contrary takes the form of two propositions, neither of which we deny.

First. It is urged (Br. 13–14) that a vested right of action is property which cannot be destroyed or arbitrarily interfered with by the legislature. *Pritchard* v. *Norton,* 106 U. S. 124, 132; *Gibbes* v. *Zimmerman,* 290 U. S. 326, 332; *Ettor* v. *Tacoma,*

228 U. S. 148, 156; *Steamship Company* v. *Joliffe*, 2 Wall. 450, 457; *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U. S. 338; *Coombes* v. *Getz*, 285 U. S. 434. We have no desire to quarrel with this principle. We assert only that a property right of this nature has no special immunity to legislative regulation, and that its enforcement may be accomplished by whatever remedy the legislature provides. If the new remedy gives to the petitioner all that the Constitution requires, it cannot complain that it was initiated after his right arose. As this Court said in *Gibbes* v. *Zimmerman*, *supra*, 332:

> The appellant says the Act of March 9 arbitrarily deprives him of a remedy for the enforcement of stockholders' liability, which remedy was his property, and was taken from him without due process. But although a vested cause of action is property and is protected from arbitrary interference (*Pritchard* v. *Norton*, 106 U. S. 124, 132), the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure. *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389, 393; *Backus* v. *Fort St. Union Depot Co.*, 169 U. S. 557, 571; *Crane* v. *Hahlo*, 258 U. S. 142, 147; *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden Co.* 284 U. S. 151, 158.

Petitioner (Br. 14) relies on three state cases to support a proposition that there is a vested right to the measure of damages authorized when the cause of action arose. *Kay* v. *Pennsylvania R. Co.*, 65 Pa. 269, 277; *Lewis* v. *Pennsylvania R. Co.*, 220 Pa. 317; *Preveslin* v. *Derby & Ansonia Developing Co.*, 112 Conn. 129. Each case relates to a retroactive imposition or modification of arbitrary limits upon specified types of tort liability after action was begun. They have no bearing on the present problem and are, moreover, inconsistent with cases such as *Home B. & L. Assn.* v. *Blaisdell*, 290 U. S. 398; *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240.

Second. Petitioner also insists (Br. 15–18) that the legislature cannot constitutionally destroy a right under the guise of regulating a remedy. *Ettor* v. *Tacoma*, 228 U. S. 148, 155; *Truax* v. *Corrigan*, 257 U. S. 312; *Brinkerhoff-Faris Co.* v. *Hills*, 281 U. S. 673, 679; *McGahey* v. *Virginia*, 135 U. S. 662. Here, again, we have no disposition to question this doctrine. But the right to which the doctrine has reference is one protected by the Constitution. If petitioner has left unimpaired all that the Constitution assures to him he cannot object that modifications in procedure have impaired expectations which are not protected by the Constitution. In other words, these cases are themselves authority for our position that the inquiry must be directed at the right remaining to petitioner; if it is ade-

quate the Constitution contains no prohibition against modification of the earlier remedy.

5. We have so far discussed the question without reliance on the fact that Congress has substituted this new remedy, not in controversies between private citizens, but with respect to controversies between the Government and its taxpayers. In regard to such controversies the power of Congress to substitute one remedy for another is even broader than would otherwise be the case.

First. The system of tax collection and refunds is the artery of the Government which carries its life-blood. The necessities of securing prompt collection and minimizing the burden of the procedure of tax refunds makes a wide Congressional control indispensable. See *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 282. In consequence it has long been settled law, as this Court, in *The Collector* v. *Hubbard*, 12 Wall. 1, said (p. 14):

> Remedies of the kind, given by Congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the law-maker, as the taxpayer cannot have any vested right in the remedy granted by Congress for the correction of an error in taxation.

This principle, that Congress has complete control over the remedies open to taxpayers, is still accepted by this Court. In *Ex parte Bakelite*

Corp., 279 U. S. 438, 451, and again in *Crowell* v. *Benson*, 285 U. S. 22, 50, it was said:

> Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

Given a power so complete, it is impossible that a taxpayer could assert a vested right in whatever procedure happened to apply when his claim accrued, or preclude legislative revision of the remedies open to taxpayers who had overpaid their taxes.

Second. The suit for the refund of taxes is essentially one which is brought against the United States, even though the Collector be the nominal party defendant. Thus, in *Curtis's Administratrix* v. *Fiedler*, 2 Black, 461, 479, it was said that "the right of action given is in its nature a remedy against the Government." In *Philadelphia* v. *Collector*, 5 Wall. 720, 733, the Court said that "a judgment against the collector in such a case is in the nature of a recovery against the United States." In speaking of the suit against the collector, the Court in *Nichols* v. *United States*, 7 Wall. 122, 127, after pointing out the sovereign

immunity to suit, said that "the allowing of a suit at all, was an act of beneficence on the part of the government." In *The Collector* v. *Hubbard*, 12 Wall. 1, 14, the Court stated that the remedies for the recovery of taxes "may be withdrawn altogether at the pleasure of the law-maker." In *Auffmordt* v. *Hedden*, 137 U. S. 310, 329, the Court said that "the action is, to all intents and purposes, with the provisions for refunding the money if the importer is successful in the suit, an action against the government for moneys in the Treasury." The *Auffmordt* case, with other tax cases, was cited by this Court in *Ex parte Bakelite Corp.*, 279 U. S. 438, 451, to establish the proposition that tax controversies were completely within the control of Congress, and this statement was repeated in *Crowell* v. *Benson*, 285 U. S. 22, 50–51. Finally, in *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382–383, this Court said:

> A suit against a Collector who has collected a tax in the fulfilment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay. *Philadelphia* v. *Collector, supra*, p. 731. There may have been utility in such procedural devices in days when the Government was not suable as freely as now.

> *United States* v. *Emery, supra; Ex parte Bakelite Corp.*, 279 U. S. 438, 452; Act of February 24, 1855, c. 122, 10 Stat. 612, Secs. 1 and 9; Judicial Code, Sec. 145; 28 U. S. C., Sec. 250; Judicial Code, Sec. 24 (20); 28 U. S. C., Sec. 41 (20). They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. *In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court.* [Italics added.]

The history of the customs administration would seem to preclude any doubt as to the power of Congress to withdraw suit against the Collector.[23] Not since 1890 (sec. 25, c. 407, 26 Stat. 131) has it been possible to sue the collector for duties erroneously assessed on imports; the United States has been made the sole party defendant. *Schoenfeld* v. *Hendricks,* 152 U. S. 691, 693–695; *United States* v. *Passavant,* 169 U. S. 16, 21; *Ex parte Bakelite Corp.,* 279 U. S. 438, 451–452, 458; *United States* v. *Stone & Downer Co.,* 274 U. S. 225, 232–233.

It is true that there are a number of decisions of this Court which speak of the action against the Collector as "personal." *Patton* v. *Brady,*

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[23] While import duties are imposed by virtue of the power to regulate foreign commerce as well as the taxing power, *Board of Trustees* v. *United States*, 289 U. S. 48, this, even if the duties were not taxes, has no bearing whatever on the status of the Collector.

184 U. S. 608, 612–615; *Sage* v. *United States,* 250 U. S. 33, 37; *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1, 4–5; *Bankers Coal Co.* v. *Burnet,* 287 U. S. 308, 312. But as we have pointed out (*supra,* pp. 40–42), these cases merely deal with the procedural consequences of the form in which Congress has chosen to allow suit against the Government, and the Court naturally adopted terminology appropriate to that question. It is also true that *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 429–430, contains a dictum to the effect that since the action against the Collector is personal it cannot be withdrawn unless there remains one against the Government; but even this rule has been met by Title VII. It is, in any event, controlled by the later decisions of this Court. In *Tait* v. *Western Maryland Ry. Co.,* 289 U. S. 620, 627, this Court held that a judgment against the Commissioner or against the United States raised an estoppel against the Collector. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, held that a retroactive imposition of liability upon the Collector was not unconstitutional because the Government was the real defendant. Neither of these decisions could have been made except on the premise that the suit against the Collector is in reality one against the Government.[24]

[24] It is a matter of some significance that three of the District Courts which have sustained Title VII have done so because the suit against the Collector may be withdrawn in exercise of the sovereign immunity to suit. *Butler* v. *Carney,* 17 F. Supp. 138, 140 (D. Mass.); *Cudahy Co.* v.

Indeed, we do not believe that it can seriously be doubted that the petitioner does not hope to recover over $300,000 (R. 8, 14) from the respondent personally, or that the Collectors as a class could repay the $963,000,000 (*infra*, p. 82) which was collected and paid into the Treasury under the Agricultural Adjustment Act. As this Court has on occasion stated, it cannot shut its eyes "to what all others than we can see and understand." *United States* v. *Butler*, 297 U. S. 1, 61; *Child Labor Tax Case*, 259 U. S. 20, 37.

We wish to make emphatically clear that this case does not require a decision as to the power of Congress to withdraw suit entirely, both against the Collector and against the Government. For Congress has left a remedy against the Government which is fair and adequate in every respect.[25] There is, accordingly, nothing in our position which is inconsistent with the statement in *Graham & Foster* v. *Goodcell, supra*, 429–430. We urge the essential identity of the suit against the Collector and that against the United States only to demon-

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Harrison, (N. D. Ill.), decided February 9, 1937, not yet officially reported but found in 1937 C. C. H., Vol. 3, p. 9450; *Wilkes-Barre Lace Co.* v. *Mundy*, (M. D. Pa.), decided January 28, 1937, not yet officially reported but found in 1937 C. C. H., Vol. 3, p. 9405.

[25] The cases holding that it is a denial of due process for a state to enact taxes without providing some remedy for their recovery in the event of their illegality are thus irrelevant. See *Brinkerhoff-Faris T. & S. Co.* v. *Hill*, 281 U. S. 673; *Carpenter* v. *Shaw*, 280 U. S. 363; *Ward* v. *Love County*, 253 U. S. 17.

strate the want of merit in petitioner's contentions that the remedy given to him at the time his claim for refund arose must be taken to be beyond Congressional control.

Third. If there were any doubt as to the application of this principle, it would be removed by the decisions in which this Court has applied a statutory modification of the taxpayers' remedy to a cause of action which had accrued before its enactment. In *Curtis's Administratrix* v. *Fiedler,* 2 Black 461, 479–480, the court indicated that an action against the Collector could, if protest were properly made, be maintained under the Act of 1845 even though the Collector was, under *Cary* v. *Curtis,* 3 How. 236, not liable at the time of importation.[26] In *The Collector* v. *Hubbard,* 12 Wall. 1, 13–16, because "a party cannot have any vested right in a remedy conferred by an Act of Congress," the court held constitutional a statute, enacted after payment of the tax, requiring appeal to the Commissioner before commencing suit against the Collector. In *United States* v. *Jefferson Electric Co.,* 291 U. S. 386, 401–402 (the opinion also covers cases in which the Collector was a defendant), the Court sustained an Act of Congress preventing recovery by taxpayers of certain

[26] In this paragraph we assume that the Court does not agree that the suit against the Collector is the equivalent of one against the United States. By this view, since the action is one personal to the Collector, his rights are entitled to the same protection as those of the taxpayer.

excise taxes which had previously been paid and claim for refund denied unless they showed, in substance, that they had borne the burden of the tax. In *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 380–383, this Court sustained a statute which retroactively made the Collector liable for the recovery of taxes which had not been protested.[27]

Finally, we believe that *Burrill* v. *Locomobile Co.,* 258 U. S. 34, forecloses any contention that Congress is unable to substitute a remedy against the United States for one against the Collector after the taxpayer's cause of action has accrued. The plaintiff, on the theory that the taxes were held unconstitutional by this Court in *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, brought suit against the Collector. This Court accepted the defense that the Collector's liability had been removed and a remedy against the State, by petition in the Supreme Judicial Court, substituted. While the changed procedure was enacted prior to payment of the taxes, the reasoning of this Court seems fully applicable to the questions presented by Title VII of the Revenue Act of 1936. It said (pp. 38, 39):

> It is true that it cannot constitutionally impose certain taxes upon foreign corporations, but if the law of the United States stops there we do not perceive why the State may not provide that only the author of the wrong shall be liable for it, at least when, as

[27] See footnote 26, *supra.*

> here, the remedy offered is adequate and backed by the responsibility of the State. That it may do so is implied in *Arkansas Building & Loan Association* v. *Madden*, 175 U. S. 269, 274.
>
> The Constitution standing alone without more does not create a paramount unchangeable liability to an action of tort on the part of all persons who may take part in enforcing a state law that it invalidates. It leaves the remedies to Congress and the States.
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> * * * * *
>
> But the common law of Massachusetts is not superior to its statutes and may be modified by them at the pleasure of the State, at least until in some substantial sense it impairs substantive constitutional rights, which it has not attempted to do.

Accordingly, we submit that the settled principles of constitutional law permit the Congress to substitute a new remedy for the recovery of taxes in place of those existing when the taxpayer's claim accrued. Any other rule would constitute a grave and a recurrent threat to the orderly administration of the revenue laws.

6. We do not, of course, argue that the power to substitute new remedies may be exercised in a manner such as to work oppression and injustice upon the taxpayer. If the new remedy itself be so plainly arbitrary and oppressive that it must fall under the due process clause it gains no immunity because it is substituted for an old remedy. But, as we read the decisions of this Court and the

dictates of constitutional government, no taxpayer can complain of an adequate and just remedy for the recovery of taxes merely because it was not in existence at the time his taxes were paid or his suit was instituted. The provisions of Title VII must, therefore, be judged in their own right. If, under their terms, substantial justice is done the taxpayer no complaint can be made because they were enacted after payment of the taxes. If there can be no vested right in any particular method of refunding taxes, a method which does substantial justice and leaves untouched all rights protected by the Constitution cannot be attacked on the ground that it is a change from the older procedure.

V

The Constitutionality of Title VII: Introductory Discussion

The following portions of the brief have no bearing on the decision of this case if the Government should prevail in its arguments that the District Court was without jurisdiction, whatever the nature of the remedy provided by Title VII. They are also immaterial if the implications in petitioner's argument should be adopted to the effect that Congress has no power under any circumstances to change the taxpayer's remedy after his cause of action accrued.

We are confident that the removal of jurisdiction prevents any examination of the constitutionality of Sections 902, 906, and 907 by this Court in this case. Our discussion of these problems is in part an excess of caution. It represents also a desire to make perfectly plain that Congress has not exercised its control over the jurisdiction of the inferior Federal courts in an arbitrary fashion or in a manner such as to work an injustice upon the taxpayers.

The discussion of the particular provisions of Title VII cannot, however, appropriately be commenced without consideration of the economic and fiscal background out of which it grew. It is also desirable to indicate the precise scope of the issues which we believe to be capable of decision in this case, if the Court should consider the constitutionality of Sections 902, 906, and 907 to be in issue at all.

1. THE ECONOMIC AND FISCAL BACKGROUND

The Agricultural Adjustment Act was originally enacted on May 12, 1933. Under its authority taxes were imposed on the processing of a rather wide variety of basic commodities.[28] These com-

[28] Taxes collected under the Agricultural Adjustment Act. The total of $963,229,196.64 does not include the $237,000.00 of taxes estimated to have been unpaid on Jan-

modities embrace the great bulk of the nation's agricultural products. Their processing requires about 20 per cent of the factory activity of the nation.[29] In the form of foodstuffs, textiles, and tobacco products they are bought by every consumer in the country. Moreover, the taxes imposed under the Act were relatively heavy. They amounted from about 10 to 57 per cent of the average market price of the raw commodity just prior to their inception; on the great commodities of wheat, cotton, and hogs (at the maximum rate) the tax was more than 50 per cent.[30]

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uary 6, 1936 (see Hearings on H. R. 12395, Senate Committee on Finance, 74th Cong., 2d Sess., p. 2).

Information compiled from Annual Reports, Commissioner of Internal Revenue: 1934, pp. 70–77; 1935, pp. 74–81; 1936, pp. 84–91.

Commodity	First effective date of tax	Total amount collected
Hogs	Nov. 5, 1933	$270,608,703.86
Wheat	July 9, 1933	250,923,623.49
Cotton	Aug. 1, 1933	246,081,073.65
Sugar	June 8, 1934	101,621,986.08
Tobacco	Oct. 1, 1933	64,039,054.80
Paper and jute	Dec. 1, 1933	13,103,803.90
Corn	Nov. 5, 1933	12,270,646.92
Peanuts	Oct. 1, 1934	3,709,987.05
Rice	Apr. 1, 1935	694,841.01
Rye	Sept. 1, 1935	175,475.88
Total		963,229,196.64

[29] Computed from the weights applied in the Federal Reserve Board Index of Factory Production (see the Federal Reserve Bulletin, February 1927, vol. 13, pp. 102–103) and the Biennial Census of Manufactures, 1931, pp. 1, 5, 8, 9, 12.

[30] Percent of average price of raw commodities, during the six months (or the full crop year in the case of rice and tobacco) prior to imposition of tax, which was repre-

More than two and one-half years after their enactment the taxes imposed under the Agricultural Adjustment Act were on January 6, 1936, declared invalid by this Court. *United States* v. *Butler,* 297 U. S. 1. During this long period almost a billion dollars of these taxes had been collected. It was inevitable that the processing taxes should have compelled a readjustment of the marketing processes and relationships attending the distribution of agricultural products. We submit that the nation's economy had so adjusted itself that for the overwhelming majority of processors the tax was no more of a burden than any other normal cost of operation.

We know of no economist who would deny the inevitability of these readjustments. The tax applied to every unit which was processed or sold and was applicable indifferently to every competitor. There was thus no opportunity (as, for example, in the case of a State tax) for a competitor in one State to undersell another in a different State who

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sented by the maximum processing tax under the Agricultural Adjustment Act. Data from monthly farm price statistics, published by Bureau of Agricultural Economics, Department of Agriculture.

	Percent
Rye	57
Rice	55
Wheat	53
Hogs	52
Cotton	51
Peanuts	38
Tobacco	35
Sugar	16
Corn	11

is more heavily taxed and thus prevent the latter from recouping the amount of the tax. Accordingly, it is universally agreed that the normal tendency is for the burden of such a tax to be shifted to another than the one who nominally pays it.[31] It may ordinarily be assumed that the tax will be shifted through increasing the price of the finished article, although in certain markets it may be shifted back to the producer or grower of the raw commodity.[32] But whatever the ultimate incidence, no economist has supposed that it would rest on the manufacturer or processor who nominally pays it. This much petitioner concedes to be generally true (Br. 31).

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[31] See, *e. g.*, Mill, *Principles of Political Economy*, p. 436; Seligman, *Incidence of Taxation*, pp. 23, 30–62, 77–78, 217–254, 339–355; and *Studies in Public Finance*, p. 136; Bastable, *Public Finance*, p. 367; Lutz, *Public Finance*, Chapter XVIII; Taussig, *Principles of Economics* (3rd Ed.), Vol. II, Chapter 71; Adams, *Science of Finance*, pp. 383–393; Brown, *Economics of Taxation*, Chapters III and IV; Green, *Theory and Practice of Modern Taxation*, pp. 130–132; Burton, *The Sales Tax* (10th Ed.); Silverman, *Taxation*, p. 110; Report of Committee on National Debt and Taxation, London, 1927, pp. 209, 372; Armitage-Smith, *Principles and Methods of Taxation*, pp. 61–62.

[32] Bastable, *supra*, note 25, p. 372; Lutz, *supra*, n. 25, p. 387; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, opinion of Mr. Justice Stone, p. 581. This seems to have been the case with respect to the processing tax on hogs. See Hearings before Senate Committee on Agriculture and Forestry on S. 1807, 74th Cong., 1st Sess., pp. 183, 185; Hearings before House Committee on Agriculture on H. R. 6133, 73d Cong., 2d Sess., p. 153; *Swift & Co. Yearbook*, 1934, pp. 16–17.

It is abundantly plain that Congress recognized this principle in the enactment of the Agricultural Adjustment Act and that it recognized the premise upon which it rested. For it took extraordinary pains to insure that no competitor of the processor would gain an undue advantage over him because of the tax. Floor stocks taxes were imposed on processed goods on hand upon the initiation or increase in rate of any processing tax (Secs. 15, 16); a compensating tax, equivalent to the processing tax and in addition to the regular tariff, was imposed on imported articles (Sec. 15 (e)); and provision was made for processing taxes to be imposed upon competing commodities (Sec. 15 (d)). Thus there was expected to be no tax-free competitor to prevent shifting the burden of the tax.

It is also evident that Congress assumed that this would result in shifting the burden of the processing tax to the consumer in domestic markets. Thus, a refund of the tax was authorized in the case of articles exported to foreign markets, where untaxed competitors would be expected to prevent recoupment from consumers (Sec. 17 (a)). In the case of processing under contracts executed prior to the initiation of the tax, the purchaser was required either to pay the tax or to make satisfactory adjustment with the processor (Sec. 18). Deliveries to charitable and other institutions which Congress did not desire to burden entitled the seller

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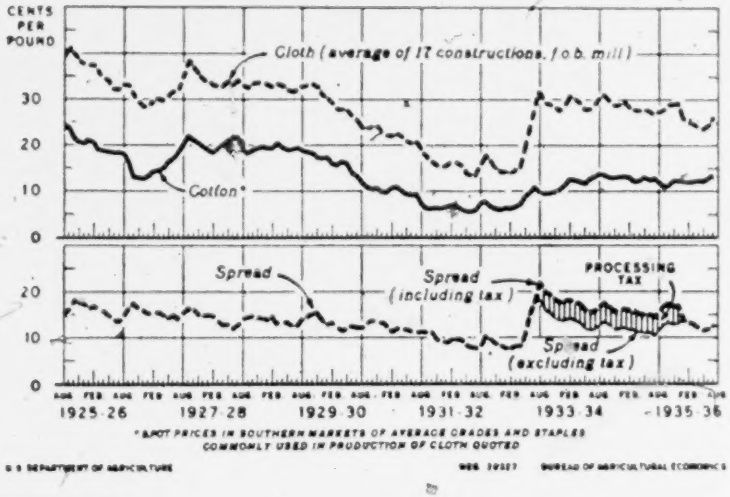
to a refund on showing that the institution had not borne the burden of the tax (Sec. 15 (c)).

The subsequent history of the Agricultural Adjustment Act demonstrates that in fact the processor was substantially unaffected by the tax. For the purposes of simplicity we shall confine our discussion to the tax on cotton.[83]

There is reproduced below a chart [84] which gives graphic evidence that the cotton processor suffered

PRICE OF RAW COTTON AND OF ESTIMATED GRAY CLOTH OBTAINABLE, AND SPREAD BETWEEN THESE PRICES, AUG. 1925-JULY 1936



[83] Two charts are reproduced in Appendix B, *infra*, pp. 188–189, which give a summary picture of the situation with respect to the taxes on the other two great commodities, wheat and hogs. In each case the processing margin increased by enough to reimburse the processor for the amount of the tax and in each case the margin declined by a substantially equivalent amount after termination of the tax.

[84] The chart was introduced by Secretary Wallace in the hearings on the Revenue Act of 1936 and is found at p. 866 of Hearings before Senate Committee on Finance on H. R. 12395. It is based on data gathered by the Bureau of Agricultural Economics.

no loss because of the imposition of the tax. The upper part of the chart shows the prices of raw cotton and of cotton goods over a ten-year period. The imposition of the processing tax on August 1, 1933, had no effect upon the price of raw cotton but was accompanied by an abrupt increase in the price of finished cotton. This increase apparently is in part due to the tax (since the price rise continued during August) and in larger part to the feverish activity in anticipation of the adoption of the N. R. A. Code, which became effective for the textile industry two weeks earlier. The picture at this time is thus not very clear, but no such complication was present when the tax was terminated on January 6, 1936, and the decline in the price of cloth, while cotton prices remained stable, can be traced only to the termination of the processing tax. The lower portion of the chart plots the spread or margin between the price of raw cotton and the selling price of the finished cloth; it thus shows the gross income realized by the processor. The shaded portion indicates the amount of the processing tax. It may readily be seen that the tax was reflected in an increased margin and that its termination brought a prompt reduction in the size of this margin.

The actual figures show an even more striking precision in the correlation between the termination of the tax and the reduction in the price of cotton cloth. The following table (Report of Agricultural Adjustment Administration, 1933 to 1935, p. 143) shows an almost exact correspondence be-

tween the amount of the processing tax, averaging 4.52 cents per pound of finished cloth, and the reduction in price of cotton cloth, avering 4.70 cents per pound after termination of the tax.

Comparative prices of 28 constructions of cotton goods as of January 4 and January 31, 1936

Type of cotton goods	Average prices Jan. 4, 1936	Average prices Jan. 31, 1936	Decline
	Cents per pound	*Cents per pound*	*Cents per pound*
10 print cloths	34.91	30.31	4.60
2 osnaburgs	26.35	21.66	4.69
3 carded broadcloths	36.55	32.47	4.08
13 sheetings	30.37	25.45	4.92
Average	32.37	27.67	4.70

The cotton processors themselves have repeatedly testified, by action and by word, that the burden of the Agricultural Adjustment Act taxes was being passed on to their customers. When they exported or sold to charities they reduced their prices and obtained refunds from the Commissioner.[85] They secured the imposition of a tax on paper and jute under Section 15 (d) of the Act on the ground that their competition resulted in "excessive shifts in consumption" from cotton to paper and jute.[86] Price quotations in the trade publications were

[85] Charitable refunds of $2,385,897.65, and export refunds of $5,326,760.82 were made on cotton goods up to Dec. 31, 1935. *Report of Agricultural Adjustment*, 1933 to 1935, p. 294.

[86] Compensatory taxes on the manufacture of certain paper and jute products were imposed from December 1, 1933, to Jan. 6, 1936. See *Report of Agricultural Adjustment*, 1933 to 1935, p. 141.

made on a "tax included" basis.[37] Beginning in August 1935 (the cotton mills had commonly ceased paying the processing tax by May 1935), the mills sold cloth under contracts containing a standard tax clause which provided for a refund to the vendee if the processor was relieved of liability for the tax.[38] This was done because of the "wide-

[37] See the Daily News Record. Beginning on the day of the inception of the tax on August 1, 1933, the prices are catalogued either "processing tax to be added" or "tax included." By September 6, 1933, all prices contained the latter notation.

[38] Hearings before Senate Committee on Finance on H. R. 12395, 74th Cong., 2d Sess., p. 300. The clause may be found in the Daily News Record, August 8, 1935, and reads as follows:

"If and when, for any reason, seller's liability for processing taxes levied under the Agricultural Adjustment Act, as heretofore and hereafter amended, is increased, decreased, or terminated, or such taxes shall be invalidated by final decision of the Supreme Court of the United States, prices on any uninvoiced portion of this contract are subject to adjustment at a rate computed on the basis of the conversion factors set up by the Treasury Decision 4433, approved May 10, 1934.

"In addition, the seller will credit on the buyer's account the amount, computed on the basis of such conversion factors, of any such tax, which, by reason of such invalidity, shall have been refunded to the seller or seller shall have been relieved from paying, with respect to any portion of this contract as to which title has passed within —— days prior to such determination of invalidity. The title shall be deemed to have passed when goods are invoiced. No such credit shall be allowed hereunder in respect of any portion of this contract upon which a direct refund from the

spread suspension of buying in the cotton-goods field" as a result of the purchasers' fear of being forced to sell tax-paid goods in competition with goods manufactured after a possible termination of the tax.[39] Mr. G. H. Dorr, Chairman of the Board of Directors of the Cotton Textile Institute, testified that the tax was an element of cost having an inevitable and immediate effect upon the market price.[40] The trade publications of the cotton textile industry repeatedly recognized that the burden of the processing tax ultimately fell on the consumer.[41]

Further evidence seems unnecessary that, as a general rule, the cotton processor did not bear the economic burden of the tax but passed it on in the form of higher prices which ultimately rested on the consumer. Petitioner at no place in his brief argues to the contrary.

Government on floor stock is recoverable by the buyer or any subsequent holder.

"In any settlement hereunder, seller shall be entitled to deduct on a pro rata basis reasonable expenses of procuring any such refund or relief."

[39] Testimony of Mr. Flint Garrison, representing the Wholesale Dry Goods Institute. Hearings before Senate Committee on Finance on H. R. 12395, 74th Cong., 2d Sess., pp. 300–301.

[40] Hearings, *supra*, n. 38, pp. 374–375.

[41] See, for example, Merritt, *Analysis of Processing Tax*, Cotton Digest, April 27, 1935, pp. 11–12; McCampbell, *Mills Were the Victims not the Beneficiaries of the "Greatest Steal"*, Daily News Record, March 30, 1936; Veit, *The Convertor's Viewpoint*, Daily News Record, April 22, 1936; *Statement of Cotton Textile Institute and Cotton Textile Code Authority*, Daily News Record, May 4, 1935.

Accordingly, the Agricultural Adjustment Act had resulted in the collection of over $963,000,000 in taxes from taxpayers who, as a general rule, did not bear the economic burden of these taxes. The decision of this Court in *United States* v. *Butler*, 297 U. S. 1, thus raised a problem of tax refunds which, in the magnitude of the sums involved and in the number and conflicting equities of the persons affected, was without precedent in the history of any nation.

In this situation there seem to have been only four alternatives among which Congress could choose.

First. The Congress could have viewed the taxes collected under the Agricultural Adjustment Act as on the same footing as any illegal collection from an individual taxpayer, and accordingly permit a full refund upon mere proof of payment. This, we submit, would be a solution which no government could with conscience adopt. The processors as a rule had not borne the burden of the tax. To repay almost a billion dollars to them merely because the mechanism of tax collection resulted in their having the nominal status of a taxpayer would generally be the equivalent of presenting to the processor a gratuity of unprecedented size. For example, the total of taxes collected on wheat processing is 7.4 times the average annual earnings of that industry during the prosperous years 1927–1929, those on cotton processing were 6.8 times the earnings for that industry, and

those on hog processing were 20.8 times the earnings for that industry."[42] These large sums would be paid to processors who probably had not been harmed in any way by the processing tax.[43] The money would, of course, sooner or later have to be raised by taxation. Certainly, no nation would consciously choose to tax the multitudes who bore the burden of the Agricultural Adjustment Act taxes for the benefit of those who did not.

Second. The Congress could have adopted a rough generalization and assumed that in every case the consumer had ultimately borne the burden of the tax.[44] On this assumption principles of jus-

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[42] Ferger, *Windfall Tax and Processing Tax Refund Provisions*, 27 American Economic Review, 45, 50, contains the data for the average annual net profits; they are computed from data published by the Bureau of Internal Revenue. The amount of taxes collected is shown in footnote 28, *supra*, p. —.

[43] Petitioner's argument (Br. 58–61) that the higher prices meant lowered volume of sales ignores the unquestioned fact that the general purchasing power was increased by the operation of the Act. While other factors, of course, contributed, it is significant that the average mill consumption of cotton averaged 458,000 running bales per month in the two years prior to the imposition of the tax, and 465,000 running bales per month during the tax period. See *infra*, pp. 155–158. (The earlier period includes the feverish activity in anticipation of the N. R. A. Code.) Data compiled from *Cotton Production and Distribution*, periodically published by Bureau of Census, Department of Commerce.

[44] This would probably be accurate in the majority of cases. In the hog industry it would, however, be roughly accurate to assume that the burden was borne by the farmer. See footnote 32, *supra*, p. 84.

tice might indicate that the tax refund should be made to the consumer. The conclusive answer to this suggestion was the complete impossibility of determining, from possibly 100,000,000 consumers, either the particular consumer or the amount of the tax burden which he bore.

Third. The Congress could have refused to make any refund of the taxes, by directing the Commissioner to make no refunds and, by virtue of the sovereign immunity, barring suit both against the United States and the Collector (see *supra,* pp. 72–78). This solution would achieve a certain rough justice. Its adoption would make unnecessary the imposition of additional taxes up to the amount of about one billion dollars and would thus benefit each of the many citizens who would have to pay the resulting increase in taxes. The taxpayers, as a class, come more closely than any other to being representative of the consumers as a class, who actually bore the burden of the tax. The great majority of the taxpayers under the Agricultural Adjustment Act may be assumed not to have borne the burden of the tax themselves, and would be subjected to no injustice were recovery denied to them.

The legislative history of the 1935 amendments to the Agricultural Adjustment Act (c. 641, 49 Stat. 768) make clear the fact that Congress would have chosen this solution in preference to allowing refund upon mere proof of payment. The amendment passed the House in a form which provided

in Section 21 (a) that no refund whatever should be made of Agricultural Adjustment Act taxes collected prior to adoption of the amendment, except where clerical errors were involved. Members of the House of Representatives considered such a provision "entirely justified." 79 Cong. Rec. 9560. The Senate committee on Agriculture and Forestry reported the bill favorably with Section 21 (a) in the form adopted by the House.[45] In the debates on the floor, the Senators were divided between those who believed the solution provided by Section 21 (a) to be fully appropriate, in view of the fact that the consumer had borne the burden of the processing tax,[46] and those who felt that justice required that provision be made for refund to the occasional processor who had himself borne the burden of the tax.[47] As a result, the Senate provided that Section 21 (d), originally applicable solely to taxes collected after adoption of the amendment, should also cover taxes theretofore paid.[48] Under Section 21 (d) the taxpayer could recover taxes collected under the Agricultural Adjustment Act if he were able to show that he had borne the burden of the tax. The Congress appeared to have been unanimously of the

[45] Senate Report 1011, 74th Cong., 1st Sess., pp. 3, 22–23.

[46] See 79 Cong. Rec., pp. 11018–11021, 11388–11390, 11447–11451.

[47] See 79 Cong. Rec., pp. 11388–11390, 11451.

[48] See 79 Cong. Rec., p. 10932.

view that the law as thus modified represented the closest possible approximation of justice."

The general principle embodied in Section 21 (d) was continued in Title VII of the Revenue Act of 1936, with important changes designed to clarify both the substance and the administration of the refunds of Agricultural Adjustment Act taxes. The principle constitutes the fourth alternative which Congress could have adopted and consists in providing for refund of the taxes to the extent, and only to the extent, that the processor actually bore the burden of the taxes. We submit that a government could do nothing else if it were anxious, on the one hand, that its citizens should not be taxed in order to confer an unwarranted benefit upon a few persons and, at the same time, solicitous to avoid injustice in the cases where the nominal taxpayer had actually borne the burdent of the tax. The basic principle was accepted by the Congress without question from any source, and was discussed chiefly with reference to Title III of the Revenue Act, providing for a tax upon unjust enrichment resulting from non-payment of Federal excise taxes.[50] By limiting refunds to those who actually bore the economic burden of the tax, no injustice is done the processor. He can ask for a larger recovery only on an admission that he

[49] See 79 Cong. Rec., pp. 9586, 10932, 11017–11021, 11376, 11388–11390, 11451, 11462, 11643, 13021.

[50] But see 80 Cong. Rec. 8652.

seeks not the remedy of a wrong but an unjust enrichment of staggering proportions. As Judge Wilkerson said in *Cudahy Packing Co.* v. *Harrison* (N. D. Ill.), decided February 9, 1937, not yet reported but found in 1937 C. C. H., vol. 3, pp. 9450, 9453:

> In enacting the legislation of 1936 Congress was attempting to prevent the perpetration of a great wrong, if not a downright fraud. It was not to be tolerated that a taxpayer who had not borne the burden of the taxes but had so conducted his business that the money with which the tax was paid was actually contributed by others, should take out of the public Treasury for his own benefit the amount of the tax.

Title VII seeks to avoid any such result and at the same time to avoid injustice to the processor who was in fact affected by the imposition of the tax.

We do not see how any one can quarrel with the general principle of Title VII. Given a situation where it is impossible to make refund to the consumer who, as a general rule, was the one actually injured by the tax, Congress has made the closest possible approximation to absolute justice. The taxpayers of the nation are all consumers, and most of the consumers are taxpayers. To relieve the taxpayer of an unwarranted burden is the rough equivalent of benefiting the consumer. At the same time Congress has sought to protect the Agricultural Adjustment Act processor to the extent

that he actually bore the burden of the tax. We submit not only that Congress has fulfilled every obligation of a Government anxious to deal fairly with its citizens but that no other course could in good conscience have been adopted.

2. THE QUESTIONS OPEN TO DECISION IN THIS CASE

Petitioner urges a wide variety of objections to the remedies provided Agricultural Adjustment Act taxpayers by Title VII. None is relevant unless this Court should hold that the nature of these remedies must be considered in order to dispose of our contentions as to the power of Congress to control the jurisdiction of the District Court. If this Court should rule that this question cannot be disposed of without some examination of the character of the remedy provided by Title VII, it then becomes necessary to consider which of the constitutional questions raised by petitioner can properly be considered at this time.

Petitioner's argument, as we understand it, is directed at only three sections of Title VII: (1) Section 902, prescribing the substantive restriction that the taxpayer may obtain a refund only to the extent that he establishes that he bore the burden of the tax; (2) Section 906 (b)–(g) establishing the Board of Review and providing for an administrative determination, subject to judicial review, in the case of processing taxes; and (3) Section 907, providing methods by which to determine whether or not the taxpayer bore the burden of the tax.

We do not dispute that, if considered relevant to the disposition of this case, the first two questions may now be considered by this Court. But we emphatically challenge petitioner's belief that this Court can at this time properly consider his objections to Section 907.

Petitioner's arguments which in reality are largely directed against Section 907 may roughly be catalogued as follows: (1) Section 902 is vague and uncertain (Br. 30–34). (2) The burden of proof imposed on the taxpayer by Section 902 is impossible for him to carry (Br. 34–40, 48–50). (3) The presumption that the processing margin is *prima facie* indicative of bearing or shifting the burden of the tax is arbitrary and unconstitutional (Br. 40–48). It will be observed that each of these contentions relates to the manner in which taxpayers will in actual practice be able to show the incidence of the Agricultural Adjustment Act taxes. They do not go to matters appearing on the face of the statute but to questions which can acquire reality only in respect to a taxpayer who has actually tried to show that he bore the burden of the tax.

We submit that this Court cannot properly consider these questions until an actual claim is filed, until the proper administrative officials and experts have acted upon this claim, and until the trained judgment of the Commissioner and the specialized administrative tribunal has been obtained on the question. Petitioner in effect asks

this Court to condemn an Act of Congress in advance of its trial on the ground that its provisions will be difficult or impossible to administer. The request is extraordinary, in that it asks this Court to enter into a speculative and purely abstract inquiry as to the accuracy with which the operation of the statute will reflect the amount of the tax refund to which the petitioner is entitled. This is a question to which there can be no definitive, or even tolerably accurate, answer except in the concrete consideration of a particular case after the claim has been filed and considered by the Commissioner. In place of these indispensable facts, we have only the conjectures of petitioner.

The Federal courts are constitutionally unable to render advisory opinions as to the validity of legislation. *Steamship Co.* v. *Emigration Commissioners*, 113 U. S. 33, 39. The reasons which compel this limitation are, even though there be a case or controversy, fully applicable to preclude speculative attacks upon the future operations of a statute. *Ashwander* v. *Valley Authority*, 297 U. S. 288, 324. The Constitution does not protect the peace of mind of the taxpayer (*Pacific Tel. Co.* v. *Seattle*, 291 U. S. 300, 304), but operates only to protect him from actual as opposed to conjectural injury. A court will not assume to declare an Act of Congress unconstitutional merely because it *might* in the future operate in an arbitrary or capricious manner. As this Court said in *Cincinnati* v. *Vester*, 281 U. S. 439, 448–449: "It is an established prin-

ciple governing the exercise of the jurisdiction of this Court, that it will not decide important constitutional questions unnecessarily or hypothetically." Again, in *Tennessee Publishing Co.* v. *American Bank,* 299 U. S. 18, 22, it said: "It is a familiar rule that the court will not anticipate the decision of a constitutional question upon a record which does not appropriately present it." See also *St. Louis I. M. & S. Ry. Co.* v. *Wynee,* 224 U. S. 354, 360; *Yazoo & Miss. R. R.* v. *Jackson Vinegar Co.,* 226 U. S. 217, 219; *Arizona Employers' Liability Cases,* 250 U. S. 400, 430; *Young Co.* v. *McNeal-Edwards Co.,* 283 U. S. 398, 400; *New Jersey* v. *Sargent,* 269 U. S. 328; *Arizona* v. *California,* 283 U. S. 423.

This Court has recently, in *Borden's Co.* v. *Baldwin,* 293 U. S. 194, 210, pointed out in unmistakable terms the rule which must be followed in deciding a question of constitutionality:[51]

> * * * it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appro-

[51] In the *Borden* case this Court remanded the case for a hearing and findings of facts looking toward a permanent injunction. This expedient is not possible, of course, in this case, since, even if the waiver of a jury were assured, the Commissioner is required to make the preliminary examination and, in the case of processing taxes, the Board of Review is to find the facts. Moreover, the nature of the factual questions require not only evidence but an actual attempt by the taxpayer to show the incidence of the tax.

> priate determinations upon evidence, so that conclusions shall not be reached without adequate factual support.

This Court has, moreover, refused to consider constitutional objections in situations offering some parallel to that now presented. In *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, the taxpayer, operating an interstate bus line, complained that the tax statute applicable to intrastate lines, based upon a quite different measure, imposed a smaller tax and thus discriminated against interstate commerce. The Court replied (p. 251):

> To gain the relief for which it prays appellant is under the necessity of showing that in actual practice the tax of which it complains falls with disproportionate economic weight on it. *General Tank Car Corp.* v. *Day,* 270 U. S. 367; *Hendrick* v. *Maryland, supra; Interstate Busses Corp.* v. *Holyoke Street Ry.,* 273 U. S. 45, 51. The record does not show that it made any attempt to do so.

More closely in point is *Boston & Maine R. Co.* v. *Armburg,* 285 U. S. 234. The railroad objected that a state Workmen's Compensation Act was unconstitutional because, among other reasons, it imposed the impossible task of allocating the payroll into hours of employment in interstate and in intrastate commerce. The Court rejected this argument because (p. 240):

> The state court thought that possible difficulties in making it could be dealt with

> administratively by rules framed by the State Insurance Commissioner, acting under authority of the Act. In any case, it is not self-evident that the Act is unworkable, and there is nothing on the record which would enable us to say that such allocation is either impossible or so difficult as necessarily to impose any burden on interstate commerce.

We think it plain that, prior to an actual test by the administrative authorities, no attack can appropriately be made upon the methods provided in Section 902 and Section 907 by which to ascertain the amount of the tax burden which petitioner bore.[52] Thus the Court of Claims in *Continental*

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[52] A somewhat analogous situation is found in the decisions which have dismissed bills to enjoin collection of the tax on unjust enrichment imposed by Title III of the Revenue Act of 1936 and holding that the objections to the method of calculation could only be determined in the ordinary procedure set up for administrative and judicial examination of tax controversies. *Sheridan Flouring Mills* v. *Cassidy*, 87 F. (2d) 20 (C. C. A. 10th), certiorari denied, No. 601, October Term, 1936; *Steinhagen Rice Milling Co.* v. *Schofield*, not yet officially reported but found in 1937 C. C. H., Vol. 3, p. 9377; (C. C. A. 5th), certiorari denied, No. 682, October Term, 1936; *White Packing Co.* v. *Robertson*, 17 F. Supp. 120 (M. D. N. C.), now pending on appeal in the United States Circuit Court of Appeals for the Fourth Circuit; *Star Milling Co.* v. *Magruder* (Md.), decided December 15, 1936, not yet officially reported but may be found in 1937 C. C. H., Vol. 3, p. 9238; *Utica Knitting Co.* v. *Shaughnessy* (N. D. N. Y.), decided December 9, 1936, unreported, appeal pending (C. C. A. 2d); *Southern Fabrics Corp.* v. *Higgins* (S. D. N. Y.), decided January 16, 1937, unreported; *Milburn By-Products Coal Co.* v. *Thurmond* (S. D. W. Va.), decided December 31, 1936, unreported; *Louisville Provisions Co.* v. *Glenn* (W. D. Ky.), 12 F. Supp. 545; see, *contra*:

Mills v. *United States,* 17 F. Supp. 138, 141, certiorari denied, No. 572, October Term, 1936, said, with respect to Section 902:

> It is sufficient to state, in addition to what has already been said, that this record contains no information tending to show that it is impossible to prove whether or not the tax in question was directly or indirectly included in the price of the article in respect of which it was imposed.

And Judge Wilkerson in *Cudahy Packing Co.* v. *Harrison* (N. D. Ill.), decided February 9, 1937, not yet reported but found in 1937 C. C. H., Vol. 3, p. 9405, said:

> If the requirements of the Act of 1936 are so stringent that it will be impossible for an honest taxpayer to comply with them, reliance must be placed upon the belief that the Congress will act with that "fine sense of honor", with which, as pointed out by the Supreme Court in *Moore Ice Cream Co.* v. *Rose, supra,* a high minded Government has heretofore dealt with its taxpayers.

An additional reason why the operation of Section 907 cannot now be considered is found in its separability from the rest of Title VII. The removal of the jurisdiction of the District Court

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Davis v. *Early* (E. D. Va.), decided December 1, 1936, not yet reported but found in 1936 C. C. H., Vol. 4, p. 10399, and *Shenandoah Milling Co.* v. *Early* (W. D. Va.), decided November 23, 1936, not yet reported but found in 1936 C. C. H., Vol. 4, p. 10439.

accomplished in Sections 904, 906 (c), and 910 in order to compel claims to be filed under Title VII would plainly have been enacted whether or not Section 907 had been enacted, as would the substantive restriction of Section 902. See *United States* v. *Jefferson Electric Co.*, 291 U. S. 386. Section 907 is merely designed to facilitate proof of the incidence of the tax, and petitioner rightly makes no reference to it in describing Section 902 as the axis of Title VII (Br. 73). It must follow that, regardless of the validity of Section 907, the rest of Title VII would remain. Thus the validity of that section seems to be wholly immaterial to the disposition of this case.

The established rule as to the proper scope of constitutional litigation can be applied in this case with no danger of injury to petitioner. If, upon an appropriate record and in the light of an actual attempt by the taxpayer to show the incidence of the processing tax, this Court should hold any part of Title VII invalid, the taxpayer may recover all of the taxes to which he is entitled under such a decision, with interest at 6 per cent per annum (Sec. 908 (a); Sec. 614 (a) of the Revenue Act of 1928, c. 852, 45 Stat. 791). For, whether or not Section 902 and Section 907 be held invalid, the Board of Review would still remain as a mechanical means by which to enforce the decision of a circuit court of appeals or of this Court. Even if Section 902 were held invalid, and recovery allowed on mere proof of payment of Agricultural Ad-

justment Act taxes,[53] the Board of Review would still have jurisdiction to review the allowance or disallowance of any claim, and the circuit courts of appeals and this Court would still have power to direct the Board to enter any designated judgment. And Section 906 (b) provides that "the Commissioner shall make refund of any such amount determined by a decision of the Board which has become final."

We have, to this point, been discussing the prematurity of any decision as to the manner in which the methods of determination provided in Section 907 will actually work out in practice. These considerations apply with added force so far as petitioner may be considered to be attacking the actual application of Section 902 to floor stocks and import compensating taxes. For, as to them, the statute provides no particular method by which to make this determination. It may be supposed, since the taxes are laid at a given moment instead of over a continuous period of manufacturing, that a simple comparison of prices over a few weeks will be sufficient to determine if the burden of the tax was shifted. However this may be, petitioner makes no attack upon the method of determining the incidence of these taxes.

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[53] We assume that, if the Court is considering the constitutionality of Sections 902 and 907, it has rejected our argument (*supra*, pp. 26–28) that Congress would have preferred making no refund whatever to this situation.

We see, therefore, no manner in which the petitioner can be injured if the questions raised as to the application of Section 907 be postponed until they may be considered in the light of an actual attempt by taxpayers to show the incidence of the Agricultural Adjustment Act taxes. There is thus no compelling reason why this Court should enter upon a speculative inquiry as to the practical operation of the presumptions and methods of proof outlined in Section 907. These intensely practical questions of economics and accounting cannot be answered *in vacuo*, but only with reference to actual facts and in the light of the expert judgment of the officials charged with the administration and application of Title VII. Petitioner, in simple terms, is crying before it is hurt.

Accordingly, it is our view that this Court, if it considers their constitutionality relevant to the disposition of this case, may consider the general principle of Section 902 and the procedural system provided for the refund of Agricultural Adjustment Act taxes, but cannot appropriately or accurately pass judgment on the methods of proof provided by Section 907.

We shall, of course, also deal with the latter question in this brief. But, to a large extent, the discussion must necessarily consist of opposing our conjectures as to the actual operation of Section 907 to those of petitioner. However thoroughly

petitioner has explored the subject, however reasonable we feel our predictions to be, the fact remains that there cannot emerge the factual certainty which alone can justify a decision as to the constitutionality of an Act of Congress.

VI

The Procedural Provisions of Title VII Are Constitutional

1. The remedy for the recovery of floor stocks taxes

Section 905 of the Revenue Act of 1936 (*infra*, p. 167), provides in substance that, after denial by the Commissioner of a claim for refund, suits may be brought against the United States in the Court of Claims or the District Courts for the recovery of all taxes imposed under the Agricultural Adjustment Act other than processing taxes. This provision will apply to the floor stocks taxes involved in this suit.

The petitioner makes no argument that the machinery set up by Section 905 for the recovery of floor stocks taxes is unconstitutional or inadequate. We can think of no argument of substance which can be directed at this procedure.[44]

[44] There is, of course, no constitutional right to a trial by jury in a suit to recover taxes. *Auffmordt* v. *Hedden*, 137 U. S. 310; *Wickwire* v. *Reinecke*, 275 U. S. 101, 105–106; *Phillips* v. *Commissioner*, 283 U. S. 589, 599 n.

2. THE REMEDY FOR THE RECOVERY OF PROCESSING TAXES

Section 906 (b) establishes in the Treasury Department a Board of Review which is given exclusive jurisdiction to review the Commissioner's allowance or disallowance of claims for the refund of processing taxes and to determine the amount of refund due the taxpayer. The Board is composed of nine members appointed by the Secretary of the Treasury from officers and employees of the Treasury Department, one being designated by the Secretary as Chairman. The Chairman is given authority to divide the Board into divisions of one or more members, and in the case of a division of more than one member to designate a chief of the division.

Under Section 906 (a) the Commissioner is required to act on all claims for refund within three years after they are filed unless the taxpayer consents to an extension of time, and under subdivision (c) the Commissioner is required to give notice of his action on the claim by registered mail. The taxpayer is given three months from the receipt of this notice in which to file a petition for review with the Board of Review (Sec. 906 (c)). If a petition for review is filed, the taxpayer is entitled to a public hearing before a member of the Board or an officer or employee of the Treasury Department designated as presiding officer (Sec. 906 (c) and (d)). The hearing is to be held either at Washington or at the taxpayer's principal place of business, as he shall specify, or at any other place stipulated

by the Commissioner and the taxpayer. (Sec. 906 (c).) The proceedings are required to be conducted in accordance with such rules of practice and procedure, other than rules of evidence, as the Board may prescribe, with the approval of the Secretary of the Treasury, and in accordance with the rules of evidence applicable to courts of equity of the District of Columbia. Both the claimant and the Commissioner are entitled to be represented by counsel, to have witnesses subpoenaed, depositions taken, and records produced (Sec. 906 (d)).

Subdivision (e) requires the presiding officer to recommend findings of fact and a decision to the Board or a division, and provides that the Board or division shall make findings of fact and enter decision. The findings and decision of a division become those of the Board within thirty days unless the Chairman direct that they be reviewed by the Board. The decision of the Board may be reviewed by the Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia for errors of law, and by this Court on certiorari (Sec. 906 (g)). In such a case, the Board is required to certify to the appellate court a transcript of the record on which the findings and decision of the Board were based. The decision of the Board becomes final in the same manner as do those of the Board of Tax Appeals under Section 1005 of the Revenue Act of 1926 (c. 27, 44 Stat. 9; U. S. C., Title 26, Sec. 640). The Commissioner is required

to make any refund finally determined by the Board (Sec. 906 (c) and (g)).

Thus the procedure in the Board of Review is in general similar to that in the Board of Tax Appeals, and the provisions for the review of the Board's decision by the Circuit Court of Appeals for errors of law is substantially the same as the statutory provision authorizing those courts to modify or reverse decisions of the Board of Tax Appeals when not in accordance with law. See Section 1003 of the Revenue Act of 1926 (U. S. C., Title 26, Sec. 641). In fact, a somewhat more complete review is assured under Section 906 for the reason that that section requires that a transcript of the record be filed in every case, and the Circuit Court of Appeals is given specific authority to order additional evidence to be taken before the presiding officer when there are reasonable grounds for failing to adduce it at the original hearing. Under the procedure relating to review of Board of Tax Appeals decisions the taxpayer, as a result of an inadequate record, has sometimes found himself in the position of trying to argue questions not raised by the record. See, for example, *Heinz* v. *Commissioner*, 70 F. (2d) 461 (C. C. A. 5th).

The petitioner does not argue that there is not a sufficient judicial review of the decisions of the Board of Review to constitute due process of law, and we submit that any such contention would be foreclosed by the decisions sustaining the analogous procedure for review for decisions of the

Board of Tax Appeals. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *Phillips* v. *Commissioner,* 283 U. S. 589. However, it seems desirable that we briefly indicate that Section 906 is well within the constitutional requirements for judicial review of administrative action.

The history of the customs administration demonstrates that judicial review of administrative action in regard to tax refunds is not required by the Constitution. *Cary* v. *Curtis,* 3 How. 236, 244–245, held constitutional the Act of 1839, the effect of which was to forbid *all* judicial trial or review. It has never been overruled and, indeed, was cited in *Ex parte Bakelite Corp.,* 279 U. S. 438, 458, for the proposition that final determination of protests against the rulings of customs collectors and appraisers "has been at times confided to the Secretary of the Treasury with no recourse to judicial proceedings." From 1845 to 1890 suit was allowed against the collector. But the Customs Administration Act of 1890 (c. 407, 26 Stat. 131) provided that the collector should not be liable for errors in collection of a type which could be appealed to the Board of Appraisers (sec. 25). *Schoenfeld* v. *Hendricks,* 152 U. S. 691, 693–695; *United States* v. *Passavant,* 169 U. S. 16, 21. A decision of the Board could be appealed to a circuit court, but the remedy was against the United States and the decision of the Board was final as to valuation. *Earnshaw* v. *United States,* 146 U. S. 60, 66; *Passavant* v. *United States,* 148 U. S.

214, 218, 221; *United States* v. *Klingenberg,* 153 U. S. 93. The remedy provided by the Act of 1890 was exclusive. *United States* v. *Lies,* 170 U. S. 628. Under the present procedure the Customs Court has been substituted for the Board of Appraisers and appeal is taken to a legislative court, the Court of Customs and Patent Appeals. (Judicial Code, Secs. 195, 196; U. S. C., Title 28, Secs. 308–309.) *Ex parte Bakelite Corp, supra,* 451–452, 458; *United States* v. *Stone & Downer Co.,* 274 U. S. 225. We see no reason why these decisions are not fully applicable to internal revenue taxes.[55]

In addition, this Court has frequently held that there is no denial of due process when a state provides only an administrative hearing by which to determine the amount of taxes due. *Londoner* v. *Denver,* 210 U. S. 373; *Pittsburgh Ry.* v. *Board of Public Works,* 172 U. S. 32; *Davidson* v. *New Orleans,* 96 U. S. 97; *Kelly* v. *Pittsburgh,* 104 U. S. 78.

However, Title VII does not go as far as these cases would permit. By Section 906 (g) the circuit courts of appeals are given jurisdiction to review the decision of the Board of Review, and "to modify or reverse such decision, if it is not in accordance with law." This, of course, includes

[55] While the import duties are imposed by virtue of the power to regulate foreign commerce as well as the taxing power, *Board of Trustees* v. *United States,* 289 U. S. 48, this, even if the duties were not taxes, would offer no justification for a procedure which would deny due process in regard to their refund.

the power to review constitutional questions, questions of general and statutory law, and whether the findings of the Board are supported by any substantial evidence. *Phillips* v. *Commisioner,* 283 U. S. 589; *Old Mission Co.* v. *Helvering,* 293 U. S. 289. There can be no substantial doubt but that every requirement of judicial review is satisfied by a procedure which ensures judicial determination of these questions.[56]

However, petitioner attacks the procedure provided by Section 906 not on the ground that the judicial review is inadequate but because the administrative hearing before the Board is itself

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[56] See, for example, the review provided for the Interstate Commerce Commission: *Cincinnati Ry.* v. *Interstate Commerce Commission,* 206 U. S. 142, 154; *Virginian Ry.* v. *United States,* 272 U. S. 658, 665–666; *Florida* v. *United States,* 292 U. S. 1, 12; the Federal Trade Commission: *Federal Trade Commission* v. *Pacific Paper Assn.,* 273 U. S. 52, 63; *Federal Trade Commission* v. *Algoma Co.,* 291 U. S. 67, 75; the Federal Radio Commission: *Radio Commission* v. *Nelson Bros. Co.,* 289 U. S. 266, 276–277; immigration proceedings: *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 660; *United States* v. *Ju Toy,* 198 U. S. 253, 261–263; *Quon Quon Poy* v. *Johnson,* 273 U. S. 352, 358; postal regulations: *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, 108–110; *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, 413; administration of the public lands: *Cameron* v. *United States,* 252 U. S. 450, 464; *Burke* v. *Southern Pacific R. Co.,* 234 U. S. 669, 684–687; workmen's compensation hearings: *Crowell* v. *Benson,* 285 U. S. 22, 48; *Voehl* v. *Indemnity Ins. Co.,* 288 U. S. 162, 166; *Del Vecchio* v. *Bowers,* 296 U. S. 280, 287; administration of the Packers and Stockyards Act: *Tagg Brothers* v. *United States,* 280 U. S. 420, 443; *Acker* v. *United States,* 298 U. S. 426, 434; *Morgan* v. *United States,* 298 U. S. 468, 477.

deemed to deny taxpayers due process of law. This is said to result because (1) the members of the Board of Review are taken from the Treasury Department; and (2) the hearing may be either before a member of the Board or an official of the Treasury Department, while the decision will be rendered by some member of the Board who did not hear the evidence.

1. We see no merit whatever in the argument that the Board hearing does not accord due process because the members of the Board are taken from the Treasury Department. Congress believed that the issue of fact as to whether or not the claimant bore the economic burden of the tax would be relatively simple in the case of taxes other than processing taxes, while in the case of processing taxes that question would involve "extremely complicated economic and accounting considerations." S. Rep. No. 2156, 74th Cong., 2d Sess., p. 33. The thought of Congress was plainly that a body of experts with previous training in the field of taxation would be the most capable of passing upon the complicated questions arising with respect to processing taxes. There is, of course, no intention on the part of the Treasury Department to permit its officers and employees who have any part in the actual assessment and collection of the processing taxes to review their own acts as members of the Board of Review. The mere fact that the Commissioner is an officer of the same Department as are the members of the Board and any other employee

designated to act as a presiding officer does not disqualify them. There cannot possibly be that personal and pecuniary interest condemned by this Court in *Tumey* v. *Ohio,* 273 U. S. 510, upon which petitioner relies (Br. 72).

In any event, petitioner's contentions ignore the uniform and plainly constitutional practice in establishing an administrative agency or tribunal. It seems unnecessary to discuss the various Federal administrative agencies since none can doubt but that each combines investigatory and judicial functions in the same agency and that their constitutionality is beyond attack on this score. No argument can be based upon the Treasury Department's interest in collecting taxes. In the first place it ignores the interest which every regulatory administrative agency or tribunal must, by definition, have which is adverse to those which it regulates. Moreover, as this Court said in *Ex parte Bakelite Corp.,* 279 U. S. 438, a review of the determinations of the customs collector has at times been confided solely to the Secretary of the Treasury. See also a recent decision of this Court, sustaining the power to lodge regulatory powers over shipping in the Department of Commerce even though the Department also operated competing vessels. *Swayne & Hoyt, Ltd.* v. *United States,* No. 494, October Term, 1936, (pamphlet, p. 3); *cf. Isbrandtsen-Moller Co., Inc.,* v. *United States,* No. 307, October Term, 1936 (pamphlet, pp. 2, 7).

2. There is no provision in the statute to the effect that one officer or member of the Board shall hear the evidence and another shall decide the case. Section 906 (b) provides that the Chairman of the Board shall divide it into divisions and that he shall designate the presiding officer to conduct each hearing. This presiding officer may be either one of the members of the Board or an officer or employee of the Treasury Department designated by the Secretary of the Treasury. The presiding officer is then required by Section 906 (e) to recommend findings of fact and a decision to the Board or "the proper division thereof", and the Board or such division must make the findings or render the decision. If the presiding officer himself is a Board member and constitutes a division, his own findings will constitute the findings of his division. If he is one member of a division, his recommendations as to findings will be considered by the division of which he is a member and its findings made. If the presiding officer is not a member of the Board at all, he merely recommends findings to a division of the Board and it makes the findings. Where the Chairman orders a review by the full board, the full Board itself will make the findings. In other cases the findings of the division become the findings of the Board. Whether the recommended findings are being considered by a division or its findings by the full Board, both the Commissioner and the taxpayer are given the opportunity

to file briefs and, on specific order, to present oral argument.

This procedure is not very different from that which obtains in reviews by the Board of Tax Appeals. Section 906 of the Revenue Act of 1924, as amended by Section 601 of the Revenue Act of 1928 (U. S. C., Title 26, Secs. 603, 617) provides that a division shall hear and decide each case and make findings, and that the findings and decision of the division shall become the findings and decision of the Board unless the Chairman orders a review by the full Board. It is possible, therefore, that members of the Board of Tax Appeals who have not heard the evidence may cast the deciding vote and reverse the decision of the Board member who did. But that procedure has been accepted without question. *Cf. New Orleans Shipwright Co.* v. *Commissioner,* 27 F. (2d) 214 (C. C. A. 5th).

It is true that in the case of the Board of Review, as distinguished from the Board of Tax Appeals, an officer or employee of the Treasury Department who is not a member of the Board may hear the evidence. Such a presiding officer will serve the same function as a special master.[57] The division or full Board will review his recommended findings and the evidence upon which they are based, and

[57] See United States Supreme Court Equity Rule 61½; *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 181–182; *Roosevelt* v. *Missouri State Life Ins. Co.*, 78 F. (2d) 752 (C. C. A. 8th).

make its own findings, after written (and, on order, oral) argument by the parties. Additional protection is found in the fact that the Circuit Court of Appeals may order additional evidence to be adduced before the presiding officer.

The case of *Morgan* v. *United States,* 298 U. S. 468, cited by the petitioner (Br. 71), is authority for the Government. It was there held that both the Packers and Stockyards Act and the principles of orderly administrative law required that the order be made by one who has considered the evidence. Under Section 906 it is impossible that any decision could be made in the Board of Review by any division or the full Board without consideration of the evidence. Moreover, the procedure of Section 906 seems to be sanctioned beyond the possibility of argument by the *Morgan* case. The court said (p. 481):

> This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them.

We know of no other objection which can reasonably be raised to the procedure of the remedy provided for the refund of processing taxes. If there be any, it may be answered, as might the specific objections of the petitioner, merely by reference to the general principles which control a question of due process in the procedural sense. The term "due process" was borrowed from the English "law of the land" (*Davidson* v. *New Orleans*, 96 U. S. 97, 101), and does not necessarily mean judicial process (*Public Clearing House* v. *Coyne*, 194 U. S. 497, 509; *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272); nor does it mean any particular kind of proceeding (*Insurance Co.* v. *Glidden Co.*, 284 U. S. 151). The due process clause of the Fifth and Fourteenth Amendments merely requires that the Federal and State Governments shall not deprive one of his property or liberty without such notice and hearing as is commensurate with the necessities of the case and the character of the rights affected. *Buttfield* v. *Stranahan*, 192 U. S. 470, 496–497; *United States* v. *Ju Toy*, 198 U. S. 253; *Chicago, Burlington &c. R'd* v. *Chicago*, 166 U. S. 226; *Phillips* v. *Commissioner*, *supra*. We submit that the procedure under Section 906 plainly accords a full and fair hearing, with adequate judicial review, and cannot be said to violate any of the requirements of due process of law.

VII

The Substantive Provisions of Title VII Are Constitutional

The basic purpose of Title VII is to limit the refund of Agricultural Adjustment Act taxes to the extent that their economic burden was borne by the taxpayer. Neither petitioner nor any of the seven briefs filed *amici curiae* suggest that the economic burden of these taxes was in fact borne by the typical processor. Petitioner none the less attacks Title VII as unconstitutional. The attack takes two forms: (1) a denial that Congress has power in this manner to limit the refund of illegal taxes, on the ground that whether or not the taxpayer was burdened by their imposition "is no business of the Government or the respondent" (Br. 61);[56a] and (2) a charge that it is, in any event, impossible either under Title VII or any other method to determine the extent of tax-shifting. As we have earlier indicated, we do not believe either of these arguments to be relevant to the disposition of this case and, even if relevant, we do not believe that petitioner's speculations as to the possibility

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[56a] The position of these taxpayers is stated even more strongly in the brief filed *amici curiae* by Messrs. Hale and Sanderson. They state that whether or not the taxpayer shifted the burden of the tax "in plain language is none of the government's business" and describe Section 21 (d) and Title VII as apparently "no more than successive hurdles wantonly cast in the way of taxpayers seeking their own property" (Br. 5, 7).

of proof are permissible on this record. We shall, however, discuss both points.

1. THE LIMITATION UPON REFUND: SECTION 902

Section 902 (*infra*, p. 165) provides in part:

> No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—
>
> (a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists

> whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; * * *

Petitioner argues (Br. 30–33) that section 902 is so vague and uncertain as to be meaningless. But section 902, in allowing a refund only when the claimant "bore the burden" of the tax, and has not "shifted such burden", was plainly intended to deny a refund of taxes to claimants who had suffered no economic injury because of their imposition.[57]

Like Section 21 (d) of the Agricultural Adjustment Act (*infra*, p. 182), it was adopted as a result of the legislative recognition of the principle that a taxpayer who is allowed the refund of a tax, the economic burden of which has been borne by another, has been unjustly enriched. In consequence, to the extent of this unjust enrichment, he should be denied the right of recovery. See S. Rep. No. 2156, 74th Cong., 2d Sess., p. 33; H. Rep. No. 1757, 74th Cong., 2d Sess., p. 32.

1. We submit that any argument to the effect that such a condition could not be attached to the right of recovery is foreclosed by the decision of

[57] Petitioner's argument that Section 902 "is so vague and uncertain as to be meaningless" (Br. 30) rests in part upon the erroneous premise that the section contemplates a comparison of the prices actually paid and received with those obtaining had there been no tax. We have accordingly treated this argument under the subsequent section dealing with the methods of proof. (See *infra*, pp. 145–148.)

this Court in *United States* v. *Jefferson Electric Co.*, 291 U. S. 386.

That case involved Section 424 of the Revenue Act of 1928 (c. 852, 45 Stat. 791). That provision, like the one here involved, was enacted after the Government had collected substantial sums illegally.[58] Section 424 provided that no refunds should be made of amounts paid by or collected from any manufacturer, producer, or importer under the automobile accessories tax imposed by Section 600 (3) of the Revenue Act of 1924, or Section 900 (3) of the Revenue Acts of 1918 and 1921, unless, *inter alia,* the claimant should establish (1) that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or (2) unless the Commissioner should certify that the claimant had given a bond conditioned upon the immediate repayment to the United States of such portion of the amount refunded as was not distributed by the claimant within six months after the date of the refund to the persons who had purchased the articles for consumption (whether the purchase was made from the manufacturer or from another party).

In the *Jefferson Electric Co.* case, as in the case at bar, the taxes were collected and the refund

[58] In that case the taxes had been collected on articles which were not embraced within the statute. See H. Rep. No. 2, 70th Cong., 1st Sess., p. 27.

claims denied before the statute was passed which required the claimant to prove that he had borne the tax as a condition precedent to recovery. The Court held that Section 424 was "an additional substantive element of the right to a refund" (p. 397), to be alleged and proved in the same manner as other elements of the right to recover (pp. 397–400), and that the imposition of this condition did not strike down any vested rights. The Court said (pp. 401–402):

> If the tax was erroneous and illegal, as is alleged, it must be conceded that, under the system then in force, there accrued to the taxpayer when he paid the tax a right to have it refunded without any showing as to whether he bore the burden of the tax or shifted it to the purchasers. And it must be conceded also that § 424 applies to rights accrued theretofore and still subsisting, but not sued on prior to April 30, 1928, and subjects them to the restriction that the taxpayer (a) must show that he alone has borne the burden of the tax, or (b), if he has shifted the burden to the purchasers, must give a bond promptly to use the refunded sum in reimbursing them. ***But it cannot be conceded that in imposing this restriction the section strikes down prior rights, or does more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief.***

> This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest.
>
> We do not perceive in the restriction any infringement of due process of law. If the taxpayer has borne the burden of the tax, he readily can show it; and certainly there is nothing arbitrary in requiring that he make such a showing. If he has shifted the burden to the purchasers, they and not he have been the actual sufferers and are the real parties in interest; and in such a situation there is nothing arbitrary in requiring, as a condition to refunding the tax to him, that he give a bond to use the refunded money in reimbursing them. [Italics added.]

The *Jefferson Electric Co.* case seems to settle beyond dispute that no taxpayer has a constitutional right to the refund of illegal taxes unless he has borne the economic burden of their imposition. Petitioner insists (Br. 65–69) that the case can be distinguished. Distinctions, it is true, may be drawn between the *Jefferson Electric Co.* case and that at bar. These distinctions might appropriately be emphasized were the question one possessing the precision and the nicety of common law pleading. But they have no place when the question relates to the constitutional power of Congress as confined by the general limitation "due process of law."

Thus, petitioner bases its distinction upon the belief that this Court viewed Section 424 as applicable only when the taxpayer collected the amount of the tax as a separate item from the vendee. Even if this were accurate, it would leave untouched the plain fact that this Court has sanctioned the refusal to refund illegal taxes to one who, although he paid them, did not bear their burden. More than this need not be drawn from the *Jefferson Electric Co.* case to sustain the validity of Section 902.

However, it seems desirable to point out that the *Jefferson Electric Co.* case is not to be confined so narrowly as petitioner urges. Its argument, in effect, seeks to convict this Court of a complete disregard of the language of Section 424 and of its legislative history. For the section forbids refund if the amount of the tax was "collected, directly *or indirectly*", from the purchaser. Its legislative history makes plain that the italicized words have their natural meaning as something beyond collection as a separate item, a provision which was expressly rejected in conference.[39]

[39] Prior to the enactment of Section 424, Congress forbade any refund of the automobile accessories tax unless a bond were given to distribute it within six months to the persons who purchased the accessories for consumption. Deficiency Act of February 28, 1927, c. 226, 44 Stat. 1250, 1254. This was done to permit study of the situation. H. Rep. No. 2, 70th Cong., 1st Sess., p. 27. The House passed the bill which became the Revenue Act of 1928 (H. R. 1) with Section 424 (so far as here relevant) as it was enacted. The bill was reported to the Senate with this limitation upon

Moreover, the Government did not confine its argument in the *Jefferson Electric Co.* case, as petitioner suggests (Br. 66), to cases where, because the tax was separately collected, the taxpayer would be liable in quasi-contract to his vendee if he kept the tax refund.[60] This Court in its opin-

refund entirely eliminated. It was amended from the floor to permit refund if the tax "was not added separately on the invoice to the purchaser." This provision was stricken in conference and the language of the House bill restored. See Revenue Act of 1928 in Its Various Forms. (H. R. 1, 70th Cong., 1st Sess.); H. Rpt. No. 1882, 70th Cong., 1st Sess., pp. 19–20 (containing a somewhat inaccurate summary of the provision as it passed the House).

[60] The sentence just before those quoted by petitioner (Br. 66) states that Section 424 was enacted because "Congress believed that in many cases refunds of taxes * * * would unjustly enrich manufacturers who had not borne the burden of the taxes." That just after those quoted by petitioner reads: "Congress provided in substance that a refund should not be made if it would in effect be a windfall to the taxpayer." Brief in *American Chain Co.* v. *Eaton*, No. 196, October Term, 1933, pp. 13–14. This language seems to embrace all forms of tax shifting.

Moreover, in its brief in *United States* v. *Jefferson Electric Co.*, No. 171, October Term, 1933, the Government brief replied to the argument that a failure to raise the price amounted to a return of the amount of the tax to the vendee as follows (p. 15):

> * * * So many factors enter into the establishment of the price at which an article may be profitably marketed that we think the fact that the total charged to the customer remains stationary is not necessarily an indication of where the burden of an excise tax is falling. * * *

This was amplified in a footnote (pp. 15–16):

> There is, for example, nothing in the record to show whether changes in the cost of manufacturing

ion repeatedly used the phrases "directly or indirectly" collected the tax (pp. 395, 397, 400), "bore the burden of the tax" (pp. 397, 400, 401, 402), or "shifted the burden" of the tax (pp. 401, 402); nowhere does it indicate an interpretation restricted to collection as a separate item.[61] Indeed, after remand of the cases covered by the *Jefferson Electric Co.* opinion, the District Court in *Willard Storage Battery Co.* v. *Routzahn* (N. D., Ohio), decided October 3, 1935, not officially reported but found in 1935 C. C. H., Vol. 3A, p. 10,501, denied recovery in part even though the tax had not been collected as a separate item from its customers (pp. 10,503–10,504). The fact that this Court naturally relied heavily upon collection as a separate item does not mean that this conclusive test of shifting the burden of the tax is the only one which Con-

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(with all the items therein included) affected the price charged for respondent's articles. Again, competition or other market conditions may have been responsible for the failure to increase prices to the purchaser.

This clearly indicates that the Government viewed the limitation as going beyond merely collection of the tax as a separate item.

[61] Petitioner relies (Br. 68) on the statement (p. 402) that "if the taxpayer has borne the burden of the tax, he can readily show it." We do not agree that the taxpayer would be able readily to show that he bore the economic burden only if his failure to collect the tax as a separate item were conclusive. The statement in the Government's brief in the *Jefferson Electric Co.* case (footnote 40 *supra*) shows that manufacturing costs and market conditions were considered appropriate and available for evidence in the trial court.

gress had adopted in Section 424; much less does it make this the farthest boundary of Congressional power.[62]

2. The basic principle of Section 902 is sanctioned not only by the *Jefferson Electric Co.* case but by the equitable principles which underlie the action for money had and received. The action "aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex aequo et bono* belongs to the plaintiff." *Claflin* v. *Godfrey,* 38 Mass. 1, 6, quoted in *United States* v. *Jefferson Electric Co., supra,* 403. Or, as this Court said in *Myers* v. *Hurley Motor Co.,* 273 U. S. 18, 24, "The defendant may rely upon any defense which shows that the plaintiff, in equity and good conscience is not entitled to recover in whole or in part." See, also,

[62] Much of the confusion in the petitioner's brief on this subject arises from the fact that it fails to distinguish between the nature of the problem involved in determining when the burden of a tax, whether sales or manufacturing, has been shifted directly or indirectly, and that of the problem of determining *what is* the sales price on which the sales tax is to be computed. Article 3 of Regulations 47, promulgated under the Revenue Act of 1921, which it cites (Br. 68), deals with the latter problem in cases where the manufacturer has billed the selling price and the tax in various ways. Rulings as to when the tax shall be included in the selling price for the purpose of computing a sales tax may have some bearing on the question of tax shifting where the tax is billed to the purchaser as a separate item, but it has none in other situations. S. T. 785, XIII-2 Cumulative Bulletin 413, shows the rules laid down for determining when the tax burden has been shifted under circumstances where the tax was not billed separately.

Lewis v. *Reynolds*, 284 U. S. 281, 283; *Bull* v. *United States*, 295 U. S. 247, 261–262. The doctrine of unjust enrichment has, moreover, received a wide application in tax cases even without the aid of a statute.[63] Thus the court in *Champ Spring Co.* v. *United States*, 47 F. (2d) 1, 3 (C. C. A. 8th), certiorari denied, 283 U. S. 852, said:

> * * * It therefore cannot be said that in equity and good conscience the plaintiff, as against the defendant, was entitled to this money. Before it could recover, it must show a better right thereto than that of the government, and this it has failed to do.

We can see nothing unconstitutional in a statute such as Section 902, which does no more than to restate this doctrine so as to require the claimant to show that the money he claims has not been recouped from others.

Even in the absence of statute the Illinois courts have denied recovery against a tax collector on the ground that the plaintiff who has shifted the burden

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[63] *United States Paper Exports Ass'n* v. *Bowers*, 80 F. (2d) 82 (C. C. A. 2d); *New York Life Ins. Co.* v. *Anderson*, 263 Fed. 527 (C. C. A. 2d); *Ralston Purina Co.* v. *United States*, 58 F. (2d) 1065 (C. Cls.); *White* v. *Stone*, 78 F. (2d) 136 (C. C. A. 1st), certiorari denied, 296 U. S. 596, and granted on March 1, 1937; *First Nat. Bank of Birmingham* v. *United States*, 12 F. Supp. 301 (N. D. Ala.); *State ex rel. Bettman* v. *Canfield Oil Co.*, 34 Ohio App. 267, 275; *People* v. *Ventura Refining Co.*, 204 Cal. 286; *Standard Oil Co.* v. *United States*, 5 F. Supp. 976, 985 (C. Cls.), certiorari denied, 293 U. S. 599; *United States ex rel. Girard Trust Co.* v. *Helvering*, 85 F. (2d) 230 (App. D. C.), certiorari granted on March 1, 1937, No. 285.

of the tax does not come into equity with clean hands when he asks their refund. *Richardson Lubricating Co.* v. *Kinney*, 337 Ill. 122; *Standard Oil Co.* v. *Bollinger*, 337 Ill. 353.

3. Petitioner urges that, even if the economic burden of the tax was borne by its vendees or the consumer, this does not present the type of unjust enrichment upon which the Congress could constitutionally act in providing for the refund of these taxes (Br. 52–58). Its argument is based upon the premises that the processed articles were sold in a free market, at a flat price which did not separately specify the amount of the tax, and that its vendees were in no sense misled as to the fact that the purchase price included at least in part the amount of a tax which might be held unconstitutional. With these premises we have no quarrel.

Nor do we deny that, under these circumstances, the vendee would be unable to recover the amount of the tax from the taxpayer who failed to pay the tax or obtained its refund. *Casey Jones, Inc.*, v. *Texas Textile Mills*, 87 F. (2d) 454 (C. C. A. 5th).[64] So, too, would the vendee[65] be unable to recover the

[64] See, also, *Heckman & Co.* v. *Dawes & Son Co.*, 12 F. (2d) 154 (App. D. C.); *Texas Co.* v. *Harold*, 228 Ala. 350; *Moore* v. *Des Arts*, 1 N. Y. 359. Compare *Wayne County Produce Co.* v. *Duffy-Mott Co.*, 244 N. Y. 351, where the taxpayer-vendor collected the tax as a separate item.

[65] The decision in the *Lash's Products* case was that the taxpayer could not recover a part of a tax of 10 percent of the selling price on the theory that the selling price was only 90 percent of the price received.

amount of the tax from the Government, for, even though he pays the seller more, "the purchaser does not pay the tax." *Lash's Products Co.* v. *United States,* 278 U. S. 175, 176. The circumstances emphasized by petitioner are material to the existence of quasi-contract, which alone can support action by the vendee. But since the economic fact of tax-shifting remains the same whether or not the elements of quasi-contract are present, the inability of the vendee to recover from the taxpayer has no bearing on the constitutional power of Congress.

A related objection to Title VII is based upon the power of Congress to impose a manufacturing tax upon articles sold to a government instrumentality which has a constitutional immunity from taxation. *Liggett & Myers Tobacco Co.* v. *United States,* Nos. 161–163, October Term, 1936. But this principle goes no further than the unquestioned doctrine that it cannot be said *a priori* that the purchaser will in every case bear the burden of the amount of the tax. Plainly there should be no immunity from taxation because of the governmental character of the purchaser if it is not certain that the tax will be reflected in the selling price. Title VII makes elaborate provision for the determination in each particular case of whether or not the burden of the tax was shifted to either the purchaser or the seller of the raw commodity.

4. Petitioner also argues that, if the taxpayers were to be unjustly enriched by the refund, this is no concern of the Government but relates only to

the equities between the taxpayer and his vendees (Br. 61–65). But, as we have earlier demonstrated (*supra*, p. 93), retention by the Government of taxes whose burden has been shifted to the consumer is the closest possible approximation of their refund to those who actually bore the burden of the taxes. Even where the administrative aspects did not make it plainly impossible to refund to the one who actually was injured, this Court in *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, 484, has upheld the analogous power of the Government to recapture excess earnings of railroads, arising because of the necessity of maintaining uniform rates.[66] It said that the excess

> may properly be appropriated by the Government for public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier.

Moreover, whatever the equities of the consumer, this does not benefit the petitioner. The equitable defense of unjust enrichment to the action for money had and received is directed not at the strength of the defendant's claim but at the weakness of that of the plaintiff (see *supra*, pp. 129–

[66] The Court relied upon the fact that the rates, though excessive for a strong road, were reasonable for the shipper. We view the shipper's resulting inability to insist upon reduction as the equivalent of the consumer's inability to recover the amount paid as a result of Agricultural Adjustment Act taxes.

131). As this Court, in *Dayton-Goose Creek Ry.* v. *United States, supra,* 484, said of the analogous claim of the railroads, this "is an objection which the carrier cannot be heard to make."

The contention that the Government must assert a better right than the claimant if it is to prevent his unjust enrichment seems to be foreclosed by the decision in *Perry* v. *United States,* 294 U. S. 330. There this Court held that repudiation of the gold clause in Government bonds left the holders without actual damage, because (pp. 357–358):

> Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever. On the contrary, in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, the payment to the plaintiff of the amount which he demands would appear to constitute not a recoupment of loss in any proper sense but an unjustified enrichment.

The statement in *Bull* v. *United States,* 295 U. S. 247, 260, that morality and conscience requires the refund of taxes illegally collected, related to a case where the retention was to the detriment of the taxpayer, not where the taxpayer was grounding his claim to an unjust enrichment on the equities of

third persons to whom it is impossible to make refunds.[67]

Petitioner relies on *Southern Pacific R. Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531; *Louisville & Nashville R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 234–238; see also *Adams* v. *Mills*, 286 U. S. 397, 406–409. These cases arose under Section 8 of the Interstate Commerce Act, which contains no limitation upon recovery by one who has not borne the burden. They held that the shipper (or consignee) could recover reparation for overcharges by the carrier notwithstanding the defense that the shipper was made whole by his customers. Each of the decisions recognized that the shipper would be unjustly enriched if he did not make restitution to his customers. Since the suit for reparation, in contrast to that to recover taxes, is not based on equitable principles, this circumstance was immaterial. Even if the cases were otherwise similar, these cases contain no hint that they were announcing a limitation upon the constitutional power of Congress.

5. Petitioner argues that Section 902 fails to recognize that the cotton processors suffered consequential damages from the processing tax, resulting from a hypothetical lowering of the volume of sales because of increased prices (Br. 58–61). We believe this objection more properly consid-

[67] We do not argue that Section 902 (b) offers any substantial possibility of reimbursing the ordinary consumer.

ered in regard to the methods of computation provided by Section 907 (see *infra*, pp. 155–158). It is sufficient at this point to indicate that the consequential benefits flowing from an increased purchasing power created by benefit payments under the Agricultural Adjustment Act might be expected to, and did (see *supra*, note 43, p. 92), more than offset this factor. The objection is thus without weight so far as the validity of the general principle underlying Section 902 is concerned.

6. The petitioner also insists (Br. 48–50) that Section 902 is made unconstitutional because it places the burden of proof upon the claimant. But it is obvious that the necessary accounting data are in the petitioner's possession. As we read petitioner's argument, most of its force depends upon its erroneous contention that it is impossible under section 907 to prove whether or not the burden of the tax was borne by the taxpayer. Thus, petitioner's objection that the facts are not within its control is bottomed upon the mistaken belief that it must prove what the prices would have been had the tax not been imposed. This contention is discussed at a later point (*infra*, pp. 145–148).

In any event, if Congress could attach this additional substantive element to the right of recovery, it obviously could require those seeking recovery to sustain the burden of proof with respect to this element as well as to all other elements of its claim. See *Lewis* v. *Reynolds*, 284 U. S. 281; *Reinecke* v.

Spalding, 280 U. S. 227; *United States* v. *Anderson*, 269 U. S. 422; *Helvering* v. *Taylor*, 293 U. S. 507.

A like burden of proof was placed upon the claimant under Section 424 of the Revenue Act of 1928, *supra*, and this provision was sustained in *United States* v. *Jefferson Electric Co.*, 291 U. S. 386.[68] Obviously the plaintiff in a suit to recover taxes paid is required to prove the amount of refund to which he is entitled, and if his recovery is conditioned upon his having borne the economic burden of the tax he must prove the refund due in the light of this condition.

There clearly can be no constitutional objection to legislation requiring a plaintiff to sustain the burden of proof, and Congress may appropriately legislate on such matters. Cf. *Selma, Rome & Railroad* v. *United States*, 139 U. S. 560, 566–568. Even without statutory authority the courts have held that the Commissioner's determination is *prima facie* correct and the taxpayer has the burden of proving it erroneous in a suit for refund or before the Board of Tax Appeals. *United States* v. *Rindskopf*, 105 U. S. 418; *Reinecke* v. *Spalding*, 280 U. S. 227; *Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S. 289; *Helvering* v. *Rankin*, 295 U. S. 123; *Helvering* v. *Taylor*, *supra*.

7. We believe that we have demonstrated that Section 902 is immune to constitutional attack, and

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[68] See also, *Jefferson Electric Mfg. Co.* v. *United States*, 10 F. Supp. 950 (C. Cls.); *Virginia-Carolina Rubber Co.* v. *United States*, 7 F. Supp. 299 (C. Cls.).

that it merely enacts the well recognized limitation upon the action for money had and received, that the plaintiff must show that in equity and good conscience he is entitled to the recovery. The remaining discussion relates to the manner in which this general principle is translated into practical terms, to permit easier proof by both the Commissioner and the taxpayer. These provisions, found in Section 907, are not material to the validity of Section 902. Without them the course of judicial and administrative interpretation would be more difficult and less consistent. But the extent to which the tax burden was shifted can be approximated by a number of methods,[69] and there is no reason to believe the technique of cost-accounting to be beyond the capacity of courts far more familiar with accounting than, for example, with the scientific and industrial facts necessary for decision as to invention and infringement under the patent laws.[70]

So far as the floor stocks taxes are concerned, recovery of which is sought in this case, the inquiry must stop here. Section 907 is not applicable to the relatively simple problem of determining

[69] This might be done by a comparison of prices, or of profits, or by cost-accounting, or by examination of billing practices and contracts with purchasers.

[70] That it is possible for courts to consider these questions, of course, is not contradictory of the fact that it is desirable that they first receive the attention of the administrative experts contemplated by Section 906.

whether or not their burden was shifted.[71] Petitioner nowhere suggests that there is any impossibility or difficulty in proving the incidence of these taxes under Section 902 alone. Thus, the remaining discussion is directed to the question of the refund of processing taxes alone.

2. THE METHODS OF PROOF OF TAX ABSORPTION OR SHIFTING: SECTION 907

The questions which will here be discussed are those which cannot adequately be explored without a practical trial in connection with the facts of a specific case. We have earlier discussed the inappropriate and premature character of petitioner's attack on these provisions (*supra*, pp. 97–107. However, and not without regret for the added number of pages, we feel forced to discuss these questions. Our purpose is two-fold: again, to err on the side of caution in a case of this importance and, further, to remove any impression that Congress has attempted to destroy all remedy of the taxpayer (see Pet. Br. 10, 74–76). For we believe that examination of Section 907 will show that there has been a painstaking and solicitous regard for the processor who in fact bore the burden of the tax, with the result that there has been provided a method which, so far as can be determined by an *a priori*

[71] Generally, a simple comparison of sales prices before and after the imposition of the tax should be sufficient. The taxes were imposed on goods held ready for sale, and change or lack of change in the price on these goods would ordinarily be conclusive as to tax shifting or absorption.

examination, provides a thoroughly fair and practical method by which to determine tax absorption or shifting.

Section 21 (d) of the Agricultural Adjustment Act (*infra*, p. 182) had been criticized by several lower courts because of its indefiniteness.[72] In response to this criticism Section 907 was enacted. Sen. Rpt. No. 2156, 74th Cong., 2d Sess. It is designed to provide a specific and practicable method by which the claimant can prove that he has borne the burden of the processing tax and, at the same time, not to foreclose his proof along any line that better fits the facts of his particular case.

The broad premise of Section 907 (*infra*, p. 173) is that any decline in earnings during the period of the tax, which is unexplained by other changes, will indicate that the processor bore the burden of the tax, while constant or increased earn-

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[72] See, for example: *Shenandoah Milling Co.* v. *Early* (Va.), decided November 23, 1936, not yet officially reported, but found in 1936 C. C. H., Vol. 4, p. 10,439; *Baltic Mills Co.* v. *Bitgood*, 12 F. Supp. 132 (Conn.); *John A. Gebelein, Inc.*, v. *Milbourne*, 12 F. Supp. 105 (Md.); *G. B. R. Smith Milling Co.* v. *Thomas*, 11 F. Supp. 833 (N. D. Tex.); *Kingan & Co.* v. *Smith*, 12 F. Supp. 329 (S. D. Ind.); *A. P. W. Paper Co.* v. *Riley*, 12 F. Supp. 738 (N. D. N. Y.).

Other courts reached a contrary conclusion. See *Rieder* v. *Rogan*, 12 F. Supp. 307 (S. D. Cal.); *Meridian Grain and Elevator Co.* v. *Fly*, 12 F. Supp. 64 (S. D. Miss.); *Henrietta Mills* v. *Hoey*, 12 F. Supp. 61 (S. D. N. Y.); *Louisville Provision Co.* v. *Glenn*, 12 F. Supp. 545 (W. D. Ky.).

ings will indicate that the burden was shifted to others. Accordingly, the statute contemplates comparison of earnings during the tax period with those during a representative period before and after the tax. In the interests of a preliminary simplicity, Section 907 (a) makes a decrease in the processing margin (the difference between the selling price of the article, after deducting the amount of the tax, and the cost of the raw commodity) *prima facie* evidence that the claimant bore the burden of the tax and, correlatively, an unchanged or increased margin *prima facie* evidence that the tax burden had been shifted. However, it is recognized that changes in the gross processing margin might reflect factors other than the tax. Accordingly, Section 907 (e) provides for a refinement or rebuttal of the result obtained under Section 907 (a). Either the taxpayer or the Commissioner may show that the change or lack of change in the margin was due to factors other than the tax. The result is that it is in the power of either the Commissioner or the taxpayer to take account of all factors which enter into the processing margin, and any remaining variation must be due to the only new factor, the processing tax. Such, in over-simplified outline, is the method of proof provided by Section 907. There follows a more detailed summary of its provisions.

Section 907 (a) provides that where the refund claimed is for processing taxes it shall be *prima facie* evidence that the burden of such amount was

borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin during a comparative period before and after the imposition of the tax. Conversely, if the average margin was not lower during the tax period than during the period before and after the tax, it is *prima facie* evidence that none of the burden of such amount was borne by the claimant. The term "tax period" is defined in Section 907 (c) to mean the period with respect to which the claimant actually paid the processing tax to the Collector, ending with the date on which the last tax payment was made. With the exception of tobacco, which does not apply to this case, the term "period before and after the tax" is defined by Section 907 to mean the twenty-four months immediately preceding the effective date of the processing tax and the six months, February to July 1936. The processing tax on cotton became effective August 1, 1933, and the petitioner's complaint shows that the last payment of processing taxes was made May 30, 1935 (R. 3). Hence, in this case the tax period extends from August 1, 1933, to May 30, 1935, inclusive, and the period before and after the tax period is the two years August 1, 1931, to August 1, 1933, and the six months, February to July 1936.

Section 907 (b) (1)–(3) provide for the computation of the average margin for the tax period

and the period before and after the tax. In computing the margin there is deducted from the gross sales value of all articles processed by the claimant for all of the months involved the cost of the commodity processed during those months and the processing tax (if any) paid with respect to such articles. The sum thus ascertained is divided by the number of units of the commodity processed during the period, the units used being those employed in the imposition of the processing tax (in this case pounds of cotton). The term "margin", when used in reference to the tax period thus means the net margin remaining after deduction for the tax.[72a]

The "gross sales value of articles" used in the computation of the margin is defined in Section 907 (b) (6) as the total quantity of each article derived from the commodity processed during all of the months involved, multiplied by the claimant's sale price current at the time of processing for articles of similar grade and quality. But if the claimant's records do not show the actual quantity obtained, he may estimate the quantity by multiplying the quantity of the commodity processed (in this case pounds of cotton) by appropriate conversion

[72a] The language of subdivisions (1) and (2) is apt to be confusing, since they speak of "averages of the margins for all the months", unless it be understood that they must, in view of subdivision (3), refer to weighted averages and that monthly averages are to be used only in connection with determining whether the tax or another increase in cost was shifted to others under Section 907 (e) (1). See Article 605 of Treasury Regulations 96.

factors,[73] giving the quantity of articles customarily obtained from the processing of each unit of the commodity. Section 907 (b) (7). The "cost of the commodity processed", used in the computation of the margin, is defined in Section 907 (b) (5) as (a) the actual cost of the commodity, if the accounting records of the claimant disclose such cost, or (b) the result obtained by multiplying the quantity of the commodity processed by the claimant by the current prices for commodities of like quality and grade which prevailed at the time of processing in the markets where the claimant customarily makes his purchases.

Thus Section 907 creates a presumption that the tax burden has or has not been borne by the claimant, depending upon whether the average margin for the tax period is or is not lower than that during the specified period before and after the tax period. Under Section 907 (e) (1), either the taxpayer or the Commissioner may attack this presumption by showing that the difference in the margin for the two periods was due to changes in factors other than the tax. This proof may include, but is not limited to, proof that there was a change in the type or grade of articles manufactured or in the commodity used in the process of

[73] The statute does not provide that the claimant must use conversion factors established by the Treasury Department. But a table of conversion factors applicable to cotton will be found in T. D. 4433, XIII-1 Cumulative Bulletin 474.

manufacture, or changes in cost of production. See, also, Section 907 (e) (2) dealing with proof such as modification of contracts of sale.

We think it relatively plain that Section 907 provides a basically fair and practicable method by which to determine whether or not a particular processor absorbed or shifted the burden of the tax. In order to avoid further increasing the length of this brief, we shall not enter upon any detailed justification and explanation of its provisions but will merely discuss the specific objections raised by petitioner or by *amici curiae*.

1. The petitioner urges that Sections 907 and 902 impose an impossible burden of proof because they require that the claimant establish the prices which it would have paid for the raw commodity and which it would have received for its finished product had the processing tax not been in effect (Br. 30–39). The short answer to this contention is that the statute makes no such requirement. It merely permits a comparison of the processing margin during the tax period with that during the representative period before and after the tax, with adjustment for any other factor which can be shown to explain the *prima facie* result so obtained. The result reflects any change in earnings attributable to imposition of the processing tax and may be taken to be the practical equivalent of determining whether or not its burden was borne by the processor.

This is a far simpler task than the intricate examination of market forces and trends, such as the demand and supply relationships, which petitioner insists he must prove to recover under Section 907. It must first be noted that so far as these forces and trends are relevant to the claimant, they must necessarily be reflected in the prices and costs considered under Section 907, either in the margin analysis or by way of rebuttal. It is true that the extent to which the imposition of the tax itself affects these forces cannot be isolated. We live, however, in a world of reality, not of abstraction, and tax refund statutes, as taxing statutes, "do not profess to embody perfect economic theory." *Weiss* v. *Wiener*, 279 U. S. 333, 335; *Helvering* v. *Midland Mutual Life Ins. Co.*, No. 257, October Term, 1936. It should be noted in passing that Section 907, in limiting the initial inquiry to the average margin, exposes neither the claimant nor the Commissioner to any very serious inaccuracy. In whatever direction prices in general are moving, they may ordinarily be expected to affect both the price of the raw commodity and of the finished product. The processing margin should not be seriously affected by the price movements which affect both elements of the margin.

With this misconception of petitioner out of the way, the cases of *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, and *Collins* v. *Kentucky*,

234 U. S. 634, have no application. The statute there held invalid made it a crime to enhance the price of harvesters above their "real value", and created a presumption of monopoly whenever a corporation sold goods at a price higher than that at which it would have been sold under free competitive conditions. In contrast to this statute, Section 907 provides for proof of actual and readily ascertainable facts.

Clearly, the processing margins themselves are factors susceptible of proof. The comparison of the margin for the tax period with that for the basic period will create a presumption that the tax burden has or has not been borne by the claimant, depending upon whether or not the margin for the tax period shows a decrease. If it does, the presumption operates against the Government and in favor of the taxpayer. If, however, the margin has not decreased during the tax period a *prima facie* presumption is created that the tax burden has been shifted. Under Section 907 (e) the taxpayer may rebut this presumption by showing that nevertheless he has borne the burden of the tax—that the increase in his manufacturing margin (ignoring the tax) is accounted for by some other cause, as, for example, an increased cost of labor. Obviously the taxpayer knows and can prove whether his labor costs or other expenses of production did in fact increase or

decrease during the tax period.[74] Accordingly, none of the factors involved in Section 907 is inherently incapable of proof.

Petitioner cites (Br. 36–39) various legal and economic authorities to demonstrate that it is impossible to prove whether or not the burden of a manufacturing or processing tax has been shifted. Each of these authorities has reference to an abstract analysis of tax incidence and none purports to state that a concrete examination of the records of a particular taxpayer could not produce a substantially accurate result. Moreover, their statements are directed to the ultimate effect, or final incidence, of the tax; the inquiry answered under Section 907 is not where the final incidence of the tax will rest, but merely whether a given taxpayer succeeded in shifting the burden from himself. It is therefore unnecessary to examine these authorities in detail.

2. The petitioner argues that the presumption arising from a comparison of the processing mar-

[74] In any case where the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, under Section 907 (e) (1) the Commissioner is required to "determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin * * *, and from the general experience of the industry", which item was shifted. If he determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he is required to apportion the change in margin between them.

gins is unconstitutional. There is no controversy as to the legal principles which must govern decision. If the presumption bears no relation to the fact to be proved, the shifting or absorption of the tax burden, it is unconstitutional. *Bailey* v. *Alabama*, 219 U. S. 219, 233–239; *McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86; *Manley* v. *Georgia*, 279 U. S. 1; *Morrison* v. *California*, 291 U. S. 82; *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639. Similarly, if the presumption is conclusive, it must be held to be invalid. *Heiner* v. *Donnan*, 285 U. S. 312; *Schlesinger* v. *Wisconsin*, 270 U. S. 230. On the other hand, if the presumption is such that there is a rational connection between the facts which raise the inference and the conclusion which is presumed, and if it is capable of rebuttal, the Constitution contains nothing to prevent the legislature from enacting that the inference shall be *prima facie* correct. *United States* v. *Wells*, 283 U. S. 102; *Mobile R. R.* v. *Turnipseed*, 219 U. S. 35, 43; *Yee Hem* v. *United States*, 268 U. S. 178; *Casey* v. *United States*, 276 U. S. 413; *Hawes* v. *Georgia*, 258 U. S. 1; cf. *James-Dickinson Co.* v. *Harry*, 273 U. S. 119.

Petitioner's argument (Br. 40–44) is that the presumption ignores the many factors, other than the cost of cotton, the processing tax, and the selling price of cloth, which affect the processing margin of the cotton mills. This we do not deny. But it seems to us to be thoroughly plain that, since these

factors are generally the most important single items in determining the processor's earnings, they may be taken as a starting point.

Petitioner's argument that any such presumption is arbitrary and capricious arises from its failure to consider the type of presumption created by Section 907 and the nature of the rebuttal allowed under Section 907 (e). The presumption is not a simple presumption of a single fact which may or may not have occurred but a presumption which is a truism. The truism may be paraphrased as follows: All other factors except the tax remaining constant during the tax period and the basic period, the absence of any decline in the processing margin must be attributable to shifting to others the burden of the tax; conversely, a decrease in the margin must be attributable to bearing the burden of the tax. The mathematical figure derived from the comparison of margins on this basis must necessarily show the extent to which the tax burden has been borne, except to the extent that other variables have in fact changed during the tax period.

The presumption established by Section 907 (a) is thus a multiple presumption. Each of the numerous costs of processing such as labor or fuel is presumed to have remained constant. If any of these factors has changed, the taxpayer or the Commissioner may rebut the presumption that it has not changed. After rebutting or accepting each of these individual presumptions, according as costs have or have not changed, and making cor-

responding adjustments of the results obtained under Section 907 (a), the taxpayer or the Commissioner will have shown the actual extent to which the burden of the tax was shifted.

If, for any reason, this marginal approach is unsatisfactory, the taxpayer may, under Section 907 (e), allow for demonstrated error or else adopt any other method of proof more appropriate for the facts of his particular case.

The result thus obtained should approximate exact mathematical accuracy more nearly than formulae employed for purposes of deductions in the revenue laws. See for example Section 114 (b) (3) and (4) of the Revenue Act of 1936 and *Helvering* v. *Twin Bell Syndicate,* 293 U. S. 312, 321–322; *Helvering* v. *Ind. Life Ins. Co.,* 292 U. S. 371. In any event it seems impossible that the margin computation could be held to have no rational connection with proof of absorption or shifting the tax burden.

Indeed, a comparison of the margins between selling price of articles and cost of the commodity is a well-recognized means of analysis in the textile industry. Kennedy, *Profits and Losses in Textiles* (1936) states [75] (p. 122):

> The most commonly used index of mill earnings is the gray goods manufacturers' margin or replacement margin, an example of which is shown in Chart II. This margin

[75] The margin referred to is expressed in cents per pound of cotton cloth, while that of Section 907 is expressed in terms of raw cotton. This is, of course, immaterial so far as the reasonableness of the margin comparison is concerned.

> represents the difference between the market price of one pound of some standard construction of gray cloth and the value, at the same or a corresponding time, of one pound of cotton.

Moreover, one of the standard indices of the condition of the textile industry, published by Mr. Alston H. Garside, economist with the New York Cotton Exchange, consists of a weekly average manufacturing margin for representative cotton articles."[*]

Petitioner specifically objects to the presumption based on a comparison of margins because it fails to take into account the possibility of changes in other processing costs (Br. 43–45). It should first be noted that this omission cannot injure the claimant, for he may show these changes under Section 907 (e) and thus modify the result obtained through comparing the margins. The contention thus reduces itself to the assertion that it is irrational to ignore these factors in making the first step which, until explained by further evidence, is *prima facie* evidence of shifting or absorbing the tax burden. So clarified, the contention requires no extended answer. If Congress had required that all of the factors which might affect the processing margin be included, the procedural utility of the

[*] See, for example, Year Book of National Association of Cotton Manufacturers, 1925, p. 214; 1926, p. 142; 1927, p. 155; 1928, p. 166; 1929, p. 186; 1930, p. 141. See also Weekly Basic Data Reports of the New York Cotton Exchange Service.

presumption would wholly be lost. While the textile industry had increased labor costs, other industries to which the Title applies did not (see, for example, the margins for wheat and hogs shown in Appendix B, *infra*, p. 188), and it is unlikely that the increased labor costs affected all cotton processors uniformly. Other industries may be expected to have had their own peculiar variations in processing costs during the tax period. We can see nothing unfair, arbitrary, or irrational in permitting inquiry into these circumstances to be avoided if neither the Commissioner nor the claimant believe the other factors have changed sufficiently to alter the result.

In any event, the processing tax more than any other cost of processing was regarded by the textile industry as the equivalent of an increase in price of the raw cotton.[17] Petitioner does not deny that the price of raw materials is the first of all costs to be shifted by the processor, since it affects all processors indifferently. So, too, would the processing tax tend to be shifted before any other processing cost. It results, if the margin were not decreased, that the processing tax might reasonably be assumed to have been shifted irrespective of the possibility of changes in other costs.

[17] See, for example, *Joint Statement of Cotton Textile Institute and the Cotton Textile Code Authority*, Daily News Record, May 4, 1935, p. 8; Wall Street Journal, April 5, 1936, p. 4.

Petitioner quotes several publications of the Department of Agriculture as authorities for the proposition that a change in margins furnishes no evidence that the tax burden has been shifted. The *Report of the Chief of the Bureau of Agricultural Economics*, 1935 (Br. 43) states that since 1934 there have been changes in the "margin between prices received by the *farmers* and the prices paid by *consumers.*" Even if the quotation referred to the *processor's* margin alone, we should agree. The *Report of the President's Cabinet Committee on the Textile Industry*, Sen. Doc. No. 126, 74th Cong., 1st Sess., p. 142 (Br. 43) states that a fixed margin does not obtain and that the effect upon selling price of a single element of cost cannot be disentangled. The *Report of Administration of Agricultural Adjustment Act, May 1933 to February 1934*, pp. 220, 236, states that a comparison in the change of prices cannot show "who pays the processing tax" and that margins were changing in the textile industry. With all of this we agree. It is, however, important to note several things. (1) These publications were speaking of the industry as a whole and not of an examination of the records of a particular processor. (2) Because processing margins in fact change because of factors other than the tax does not make unreasonable or irrational a preliminary assumption that the tax is responsible for the change, or that it was the first of the changed costs to be shifted. (3) The statements were concerned with

the ultimate incidence of the tax, as between producer, processor, distributor, retailer, and consumer. Title VII is concerned only with whether or not the particular processor bore this burden of the tax.

There remains only petitioner's objection that the presumption is in fact conclusive (Br. 47). The argument emphasizes the language of Section 907 (e) which provides for rebuttal by showing "the actual extent" to which the tax burden was shifted, and relies on the premise, earlier shown to be erroneous (*supra*, pp. 145–148), that under Sections 902 and 907 the taxpayers must show what the prices of raw commodities and finished articles would have been had there been no tax. But we have already demonstrated that Section 907 (e) (1) merely provides for refinement of the rough results reached under the presumption, and we do not understand that petitioner denies that rebuttal evidence of this nature may easily be proved.

3. Petitioner also argues that both Section 902 and 907 are arbitrary and unconstitutional because of their failure to take into consideration the consequential losses suffered by processors because of the imposition of the processing tax (Br. 58–61). Such, too, is the argument of *amici curiae* (Mr. Buckingham, pp. 13–15; Mr. Barker, pp. 4–5).

It should be noted at the outset that this argument contradicts the implication of petitioner's earlier argument (Br. 43–45) that the increased price of cotton cloth may well be traced to factors other than the processing tax. If it is said

to be arbitrary to raise a presumption that a rise in the processing margin is due to the tax, we do not see that petitioner can at the same time object that the increase in price, resulting in hypothetically lowered sales, caused the processors losses which can be traced to the tax.

However this may be, petitioner's argument is contrary to fact. There is no contention that the processors did in fact suffer a loss in volume. Petitioner's tax payments indicate that its volume in ~~example, the margins for wheat and hogs shown in Ap-~~ cotton mills actually increased during the period of the tax.[78] During the two years prior to imposition of the tax on August 1, 1933, cotton consumption by American mills averaged 458,000 running bales, while during the period of the tax it averaged 465,000 running bales per month.[78] We do not see that, in the face of an actual expansion in production, petitioner can ask that an Act of Congress be declared invalid because it fails to recognize the consequences of a curtailed production.

Of course it is not denied that, if there had been no processing tax, and if the market forces had been the same as though there were no tax, the sales of cotton cloth would have been larger. For the burden of the processing tax on cotton was generally passed on to the consumer (as petitioner admits in making this argument) and we may sup-

[78] Computed from data published in *Cotton Production and Distribution*, issued periodically by the Bureau of the Census, Department of Commerce.

pose that the additional price limited the purchases which otherwise would have been made. But if we are to consider some of the indirect consequences of the imposition of the processing taxes, we must take into account all of these consequences. Without entering into an attempt to estimate their economic wisdom or their precise effect, the payment of benefits to farmers under the Agricultural Adjustment Act was one of the measures adopted in 1933 to restore the equilibrium of our economic system of production and exchange. With the restoration of this balance, employment was expanded by the resumption of productive activity, leading to increased factory pay rolls and thus to stimulated consumer demand.[79] The increased expenditures of farmers, not only for cotton goods but also for a wide variety of commodities, may well have stimulated an expansion in urban employment and pay rolls by amounts much in excess of the benefit payments involved. The indirect effects of the processing taxes, instead of being detrimental to cotton processors through a decline in consumption, seem actually to have been advantageous to them, as seen in the demonstrated fact of increased consumption.

In view of the diverse and balancing effects of these various economic factors we submit that it was wholly fair to omit them from consideration in

[79] For a thorough treatment of this widely accepted economic principle, see B. M. Anderson, Economist for the Chase National Bank, *Equilibrium Creates Purchasing Power*, Chase Economic Bulletin, June 12, 1931.

establishing the methods of proving absorption or shifting of the tax burden. That it would have been thoroughly impractical to take them into account goes without saying, and we have already shown (*supra*, pp. 145–148) that Congress need not take into consideration the remote and incalculable effects of changing market forces.

In any event, petitioner's argument is conclusively answered by *United States* v. *Jefferson Electric Co.*, 291 U. S. 386. For whether or not the Court in that case considered only a tax passed on as a separate item, the effect in reducing sales was the same as that of the Agricultural Adjustment Act taxes. If the Constitution did not require allowance for the reduced sales in that case, it cannot do so here.

4. Petitioner also objects (Br. 45–47) that Section 907 provides an unfair comparative period, in that the margin during the tax period is compared with a period taken at the lowest ebb of the depression. The basic period applicable to this case is the two years, August 1931 through July 1933, and the six months, February 1936 to July 1936, inclusive. It is obvious that the petitioner's statement is not true as applied to the last six months. We concede that the balance of the period was a depression period, but the processing taxes were initiated during that period and it hardly can be said to be unreasonable to make a comparison of the tax period with the period immediately before and after the tax. The factors other than the processing tax would have changed to a smaller

degree than if the comparison were with the more remote years of continuous business prosperity.

This is especially true of the cotton-textile industry, as may be seen from a glance at the trend of the processing margin over past years, shown in the chart reproduced above (p. 86). It will be seen that from a level of around 17 cents per pound in 1925, the cotton processing margin on 17 typical constructions of cloth declined steadily, until in early 1933 it had sunk to about 9 cents per pound. This steady and pronounced fall in the processing margin was the result of adjustments in competitive prices due to technical improvements in spinning and weaving, and to geographical shifts in the industry affecting costs. Since there has been this definite and long-continued change in what must be considered as the normal processing margin in cotton processing, it would be palpably misleading to insist upon comparisons between periods too far removed from each other.

Petitioner also urges that it is unreasonable to employ this short comparative period in Title VII of the Revenue Act, when Title III, imposing a tax on unjust enrichment, employs, for substantially the same purpose, a six-year period before the tax. This difference in the comparative periods may be explained not only by the different legislative history of the two titles,[80] but by the fact that in Title

[80] Title VII was not in the bill which became the Revenue Act of 1936 when it passed the House but, in contrast to Title III, was contained in a bill to amend administra-

III it was impossible to use the six month period after invalidation of the processing tax. Under Section 501 (c) and (e) the comparison was made on a basis which includes, in the second alternative, data based on the entire taxable year in which were sold the articles with respect to which a tax was imposed but not paid. This taxable year would for many taxpayers include the six months February to July 1936. It is plainly illogical that the same six months should be used in both comparative periods. Thus, it was necessary to extend the pre-tax period back farther than two years in order to provide a fair comparison. Whether or not the additional four years does more than to offset this is irrelevant to the constitutional power of Congress.

The quotations (Br. 46) from the Senate report and from a Government brief on Title III in a lower court, which emphasize that Title III, through the length of its comparative period, is wholly fair to the taxpayer, do not mean that a shorter period would be unfair. Fairness is a matter of degree, and laws relating to taxes are not known for their consistency in this regard.

5. A brief *amicus curiae* (Mr. Barker, pp. 11–17) urges that Title VII must be declared unconstitutional because it contains a faulty definition of the "cost of the commodity" and the "gross sales value

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tive provisions of the internal revenue laws (H. R. 12793, 74th Cong., 2d Sess.) which was reported to the House (H. Rpt. No. 2818) but never passed.

of articles" in Section 907 (b) (5) and (6) (*infra*, p. 175). Passing the obvious thought that this is a rather small peg on which to hang so weighty a demand as to declare the whole of Title VII invalid, we submit that the objection is misfounded.

To permit Title VII to operate both in industries where books were kept on a basis which reflected the actual cost of the specific lot of commodity processed and in those where stocks were intermingled and the cost taken to be the market price at the time of processing, Congress provided that either method could be used. We see nothing but plain sense and elementary fairness in this provision. The brief presents hypothetical examples of processors, otherwise similarly situated, which appear to show alarming divergences.[81] Were we to engage in a war of hypotheses, we could, of course, present examples where the result would be precisely the same. But, without losing sight of the exaggerated character of the hypothetical examples, and if we, in turn, may propose our conjectures, it seems that the books of the two processors would probably show substantially the same cost. Any processor who bought his cotton so far in advance may probably be expected to "hedge" his purchase. Garside, *Cotton Goes to Market*, p. 326. The rise in price of cotton held for processing would be balanced by a loss on the cotton sold on the exchange for future delivery; this loss, in coun-

[81] As a matter of fact, of course, most processors in any given industry keep their books on the same basis.

sel's examples, would probably enter into the "actual cost" of the commodity.

Section 906 (b) (6) provides that sales price shall be measured by current prices at the time of processing. Counsel finds this arbitrary, since it is elementary that a tax cannot be shifted until the article is sold. But if the processor were building up an inventory of finished goods, he may be supposed, in the light of common practice in the industry, to hedge by selling cotton futures, so that the actual net sale price would be very close to that prevailing on the date of processing. But the conclusive answer is that, if a case such as counsel pictures should arise, we see no reason why these facts would not of themselves constitute a rebuttal of the presumption arising from the margin comparison. Section 907 (e) permits any type of rebuttal.

We therefore submit that Section 907 provides a fair and practicable method of determining whether or not the burden of the processing tax was borne by the processor. It does "not profess to embody perfect economic theory" and may possibly ignore "some things that * * * a theorist * * * would take into account," such as the precise balance between the effect of benefit payments in increasing demand and that of the processing taxes in raising prices. But the Constitution does not demand an impossible perfection in tax laws. *Weiss* v. *Wiener,* 279 U. S. 333, 335; *Helvering* v. *Midland Mutual Life Ins. Co.,* No. 257, October Term, 1936. We also

admit that an absolute and theoretically perfect precision of analysis of the extent of tax absorption will probably not always be obtained in practice. The accounting and economic problems in some cases will be complex and difficult. But this cannot serve to strike down an act of Congress as unconstitutional. However, we entertain no doubt but that "fair and reasonable approximations" can be reached in every case. The Constitution requires no more. As this Court said in *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, 190–191:

> Undoubtedly, the administration of an act like this one is attended with some difficulty. Measurements and calculations are more or less complicated. Absolute precision in either probably cannot be attained; but that is so to a greater or less degree in respect of most taxing laws. If, for example, absolute exactness of determination in respect of net income, deductions, valuation, losses, obsolescence, depreciation, etc., were required in cases arising under the federal income tax law, it is safe to say that the revenue from that source would be much curtailed. The law, which is said not to require impossibilities, must be satisfied, in many of its applications, with fair and reasonable approximations. Compare *Smith* v. *Illinois Bell Tel. Co.*, 282 U. S. 133, 150; *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 563–566; *Commonwealth* v. *People's Five Cents Savings Bank*, 87 Mass. 428, 436.

We wish again to emphasize that all discussion of Section 907, whether by petitioner, *amici curiae*, or in this brief, has to a greater or less degree been conjectural. But if this Court should feel that the constitutionality of the provisions of Section 907 should be determined on this record, we submit that it meets every requirement of the Constitution.

CONCLUSION

For the reasons which have been set out in this brief, we believe that the District Court was without jurisdiction to entertain this suit. If this Court should feel obliged to look beyond these basic barriers to petitioner's suit, we submit that Title VII of the Revenue Act of 1936 meets every requirement of the Constitution and of fair dealing to the taxpayers. We therefore respectfully submit that the decision of the court below should be affirmed.

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MARCH, 1937.

APPENDIX A

Revenue Act of 1936, c. 690, 49 Stat. 1648, 1747:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

SEC. 901. REPEALS.

Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act, as amended, are hereby repealed.

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under Section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to

which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

SEC. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

SEC. 904. STATUTE OF LIMITATIONS.

Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought.

SEC. 905. JURISDICTION OF COURTS.

Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases.

SEC. 906. PROCEDURE ON CLAIMS FOR REFUNDS OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employees of the Treasury Department designated by the Secretary of the Treasury. One of such members shall be designated by the Secretary to act as chairman of the Board. The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member designate the chief thereof. A majority of the members of the Board or of any division thereof shall constitute a quorum for the transaction of the business of the Board or of the division respectively. A vacancy in the Board or in any division thereof shall not impair the powers nor affect the duties of the Board or division nor of the remaining members of the Board or division respectively. The Secretary of the Treasury shall assign to the Board such personnel in the Treasury De-

partment as may be necessary to perform its functions. The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by a decision of the Board which has become final. The proceedings of the Board and its divisions shall be conducted in accordance with such rules and regulations as the Board may prescribe, with the approval of the Secretary.

(c) The allowance or disallowance of the Commissioner of a claim for refund under this section shall be final, unless within three months after the date of mailing by registered mail by the Commissioner of notice that a claim for refund of any such amount has been disallowed, in whole or in part, the claimant files a petition with the Board requesting a hearing on the merits of his claim, in whole or in part. Upon the filing of any such petition, the claimant shall be entitled to a hearing as provided herein, and within three months after the date of such filing the Board shall set a date for such hearing which shall be not more than two years from the date of filing of the petition. Such hearing shall be held in Washington, District of Columbia, or in the collection district in which is located the principal place of business of the claimant, as the claimant may designate in his petition, or in any place which may be designated by the Commissioner and the claimant by stipulation in writing, and may be continued from day to day. The Board shall notify the claimant and the Commissioner of the time and place set for such hearing by registered mail.

(d) Each such hearing shall be conducted by a presiding officer who shall be a member of the Board or an officer or employee of the Treasury Department designated a presiding officer by the Secretary of the Treasury, and assigned by the Board to preside at such hearing, and shall be open to the public. The proceedings in such hearings shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe with the approval of the Secretary of the Treasury, and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. The claimant and the Commissioner shall be entitled to be represented by counsel, to have witnesses subpenaed, and to examine and cross-examine witnesses. The presiding officer shall have authority to administer oaths, examine witnesses, rule on questions of procedure and the admissibility of evidence, and to require by subpena, signed by any member of the Board, the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, records, correspondence, memoranda, and other evidence, from any place in the United States at any designated place of hearing, and to require the taking of a deposition by any designated individual competent to administer oaths. Any witness summoned or whose deposition is taken pursuant to this section shall receive the same fees and mileage as witnesses in the courts of the United States.

(e) The presiding officers shall recommend findings of fact and a decision to the Board or the proper division thereof within six months after the conclusion of the hearing. Briefs with respect to such recommenda-

tions may be submitted to the Board or such division on behalf of the Commissioner and the claimant within thirty days after such recommendations have been made, unless such time is extended by the Board or such division. Except upon specific order of the chairman of the Board, no oral argument may be presented to the Board or such division after the conclusion of the hearing. The Board or a division shall make its findings of fact and decision in writing as quickly as practicable. The findings of fact and the decision of a division shall become the findings of fact and decision of the Board within thirty days after they have been made by the division, unless within such period, the chairman has directed that such findings and decision shall be reviewed by the Board. The findings and decision of a division shall not be a part of the record in any case in which the chairman directs that such findings and decision shall be reviewed by the Board. Copies of the findings of fact and decision of the Board shall be mailed to the claimant and the Commissioner by registered mail.

(f) The Board, with the approval of the Secretary of the Treasury, is authorized to draw up a table of costs and fees relating to such hearings, and the preparation of transcripts of record thereof, not to exceed with respect to any one item those charged in the Supreme Court of the United States. Such costs and fees shall be paid by the claimant and be collected in accordance with such rules and regulations as may be prescribed by the Board, with the approval of the Secretary. If the hearing provided herein results in a modification of the allowance or disallowance of the Commissioner, such costs shall be returned to the claimant.

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court, in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require. No objection shall be considered by the court unless such objection shall have been urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure

to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken, and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code, as amended. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused as justice may require. The decision of the Board made after the hearing provided herein shall become final in the same manner that decisions of the Board of Tax Appeals become final under section 1005 of the Revenue Act of 1926, as amended.

SEC 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period

than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown

by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity or commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may

determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burdens of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initia-

tion, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.

SEC. 910. LIABILITY OF COLLECTORS.

No collector of internal revenue or customs, or internal revenue or customs officer

or employee, shall be in any way liable to any person for any act done by him in the assessment or collection of any amount as tax under the Agricultural Adjustment Act, or for the recovery of any money exacted by or paid to him and paid into the Treasury, in performance of his official duties under the provisions of such Act, or if such collector or officer acted under the direction of the Secretary or other proper officer of the Government.

SEC. 913. DEFINITIONS.

When used in this title—

(a) The term "tax" means a tax or exaction denominated a "tax" under the Agricultural Adjustment Act, and shall include any penalty, addition to tax, additional tax, or interest applicable to such tax.

(b) The term "processing tax" means any tax or exaction denominated a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee.

(c) The term "commodity" means any commodity, prior to processing, of a type with respect to the processing of which a processing tax was imposed under the Agricultural Adjustment Act.

(d) The term "article" means the product which is obtained by processing a commodity, and includes the product obtained by further manufacture or by combination with other materials.

(e) The term "refund" includes any recovery, recoupment, set-off, credit, or counterclaim.

(f) The term "Agricultural Adjustment Act" means the Agricultural Adjustment Act as originally enacted and the amend-

ments thereto adopted prior to January 6, 1936.

Revised Statutes:

SEC. 3220. [As amended by Sec. 1111 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 115, and Sec. 619, of the Revenue Act of 1928, c. 852, 45 Stat. 791, 878.] Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section (U. S. C., Title 26, Sec. 1670–1671).

SEC. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court (U. S. C., Title 26, Sec. 1543).

SEC. 3226. [As amended by Sec. 1103 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 286, and Sec. 807 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, 1745.] No suit or proceed-

ing shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. Any consideration, reconsideration, or action by the Commissioner with respect to such claim following the mailing of a notice by registered mail of disallowance shall not operate to extend the period within which suit may be begun. (U. S. C., Title 26, Secs. 1672–1673).

SEC. 3228. [As amended by Sec. 1112 of the Revenue Act of 1926, Sec. 619 of the Revenue Act of 1928, and Sec. 1106 of the Revenue Act of 1932.] All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected with-

out authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceeding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund.

* * * * *

(U. S. C., Title 26, Sec. 1433.)

Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended by the Act of August 24, 1935, c. 641, 49 Stat. 768, 771:

SEC. 21. (d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counterclaim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or in-

directly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of section 16, had the tax terminated by proclamation pursuant to the provisions of section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such

holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor (conforming to such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the pay-

ment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail.

(3) The District Courts of the United States shall have jurisdiction of cases to which this subsection applies, regardless of the amount in controversy, if such courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy.

Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended by the act of May 9, 1934, c. 263, 48 Stat. 670; the act of March 18, 1935, c. 32, 49 Stat. 45; and the act of August 24, 1935, c. 641, 49 Stat. 750.

Sec. 9 (a):

To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that any one or more payments authorized to be made under section 8 are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation * * *. The processing tax shall be levied, assessed, and collected upon the first

domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that all payments authorized under section 8 which are in effect are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture * * *.

Sec. 9 (d) (2):

In case of cotton, the term "processing" means the spinning, manufacturing, or other processing (except ginning) of cotton; and the term "cotton" shall not include cotton linters.

Sec. 16 (a):

Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (includ-

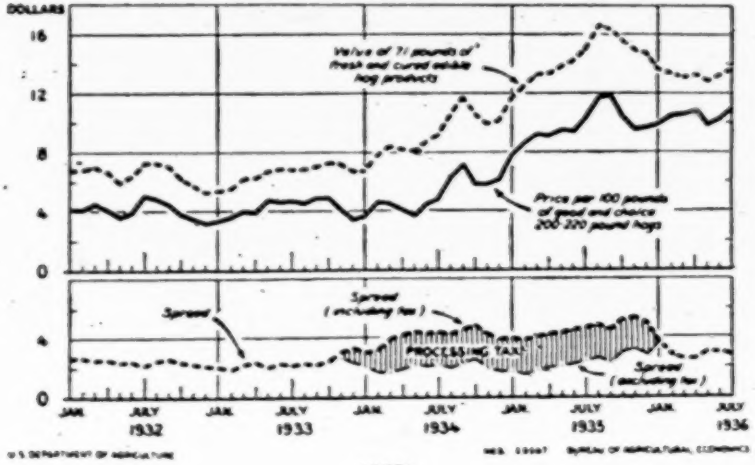
ing articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date. Such tax upon articles imported prior to, but in customs custody or control on, the effective date, shall be paid prior to release therefrom. In the case of sugar, the tax on floor stocks, except the retail stocks of persons engaged in retail trade, shall be paid for the month in which the stocks are sold, or used in the manufacture of other articles, under rules and regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.

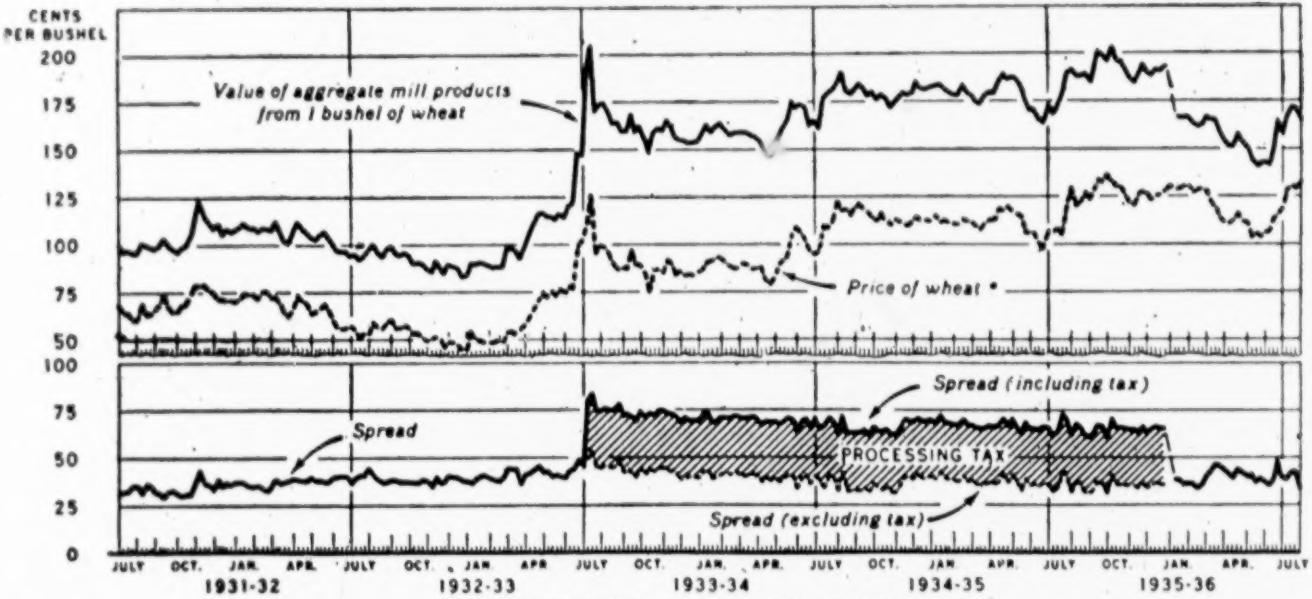
APPENDIX B

Charts prepared by Bureau of Agricultural Economics, Department of Agriculture. Printed at p. 865 of Hearings on H. R. 12395 (Revenue Act of 1936) before Senate Committee on Finance, 74th Cong., 2d sess.

PRICE OF HOGS AND WHOLESALE VALUE OF HOG PRODUCTS, CHICAGO, AND SPREAD BETWEEN PRICE AND VALUE, JAN. 1932 - JULY 1936



PRICE OF WHEAT AND WHOLESALE VALUE OF MILL PRODUCTS, AND SPREAD BETWEEN PRICE AND VALUE, MINNEAPOLIS, JULY 1931-36



*NO. 1 DARK NORTHERN SPRING (15 PERCENT PROTEIN)

U.S. DEPARTMENT OF AGRICULTURE

NEG. 20823 BUREAU OF AGRICULTURAL ECONOMICS

APPENDIX C

DETERMINATION OF TAX SHIFTING UNDER SECTION 907

The following oversimplified example is intended to be illustrative only:

1. Number of pounds of cotton processed during period before and after tax (Sec. 907 (b) (2) and (3) and (c))	1,000,000
2. Total cost of this cotton (either actual cost or current price at time of processing) (sec. 907 (b) (5))	$100,000
3. Number of pounds of sheeting manufactured from this cotton, neglecting by-products (Sec. 907 (b) (6) and (7))	900,000
4. Total selling price (current price at time of processing) (Sec. 907 (b) (6))	$300,000
5. Item 4 minus item 2 (Sec. 907 (b) (2) and (3))	$200,000
6. Average margin during period before and after tax (item 5 divided by item 1) (Sec. 907 (b) (2) (3) and (c))	$0.20
7. Number of pounds of cotton processed during tax period (Sec. 907 (b) (1) (3) and (c))	1,500,000
8. Total cost of this cotton (either actual cost or current price at time of processing) (Sec. 907 (b) (5))	$180,000
9. Number of pounds of sheeting manufactured from this cotton (Sec. 907 (b) (6) and (7))	1,350,000
10. Total selling price (current price at time of processing) (Sec. 907 (b) (6))	$573,000
11. Amount of processing tax per pound of cotton (Sec. 907 (b) (1) and (3))	$0.042
12. Total amount of tax paid (item 7 times item 11)	$63,000
13. Item 10 minus the total of items 8 and 12 (Sec. 907 (b) (1) and (3))	$330,000
14. Average margin during tax period before and after tax (item 13 divided by item 7) (Sec. 907 (b) (1) and (3))	$0.22

Since the average margin was not lower during the tax period than before, *prima facie* the taxpayer shifted the burden of the processing tax.

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15. The claimant rebuts (Section 907 (e) (1)) by showing increased labor costs, per pound of sheeting, of	$0.03
16. This is equivalent, per pound of cotton (multiplying item 15 by the quotient of item 9 divided by item 7), to	$0.027
17. The Commissioner shows (Section 907 (e) (1)) a fuel saving amounting, per pound of sheeting, to	$0.002
18. This is equivalent, per pound of cotton (multiplying item 17 by the quotient of item 9 divided by item 7), to	$0.0018
19. The margin during the tax period should thus be reduced by (item 16 minus item 18)	$0.0252
20. Average margin during tax period after adjustments for charged costs (item 14 minus item 18)	$0.1948
21. The claimant bore the burden of the tax, per pound of cotton, to the extent (item 6 minus item 20) of	$0.0052
22. Total amount of tax burden borne by claimant (item 21 times item 7)	$7,800

The claimant would thus be entitled to a refund of $7,800. The actual claim, while using period totals, would also include monthly margin computations. Section 907. This would permit the Commissioner, under Section 907 (e) (1) to ascertain if the increased labor or decreased fuel costs were actually reflected in the margin, or to check the margin behavior against the sales practices of the claimant as indicated in Section 907 (e) (2); in this illustrative example we assume that the Commissioner determines that those cost charges were actually reflected in the margin.

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